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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1998

IMMIGRATION AND NATURALIZATION SERVICE AND ROSANNE SONCHIK, DISTRICT DIRECTOR, PETITIONERS

v.

DANIEL MAGANA-PIZANO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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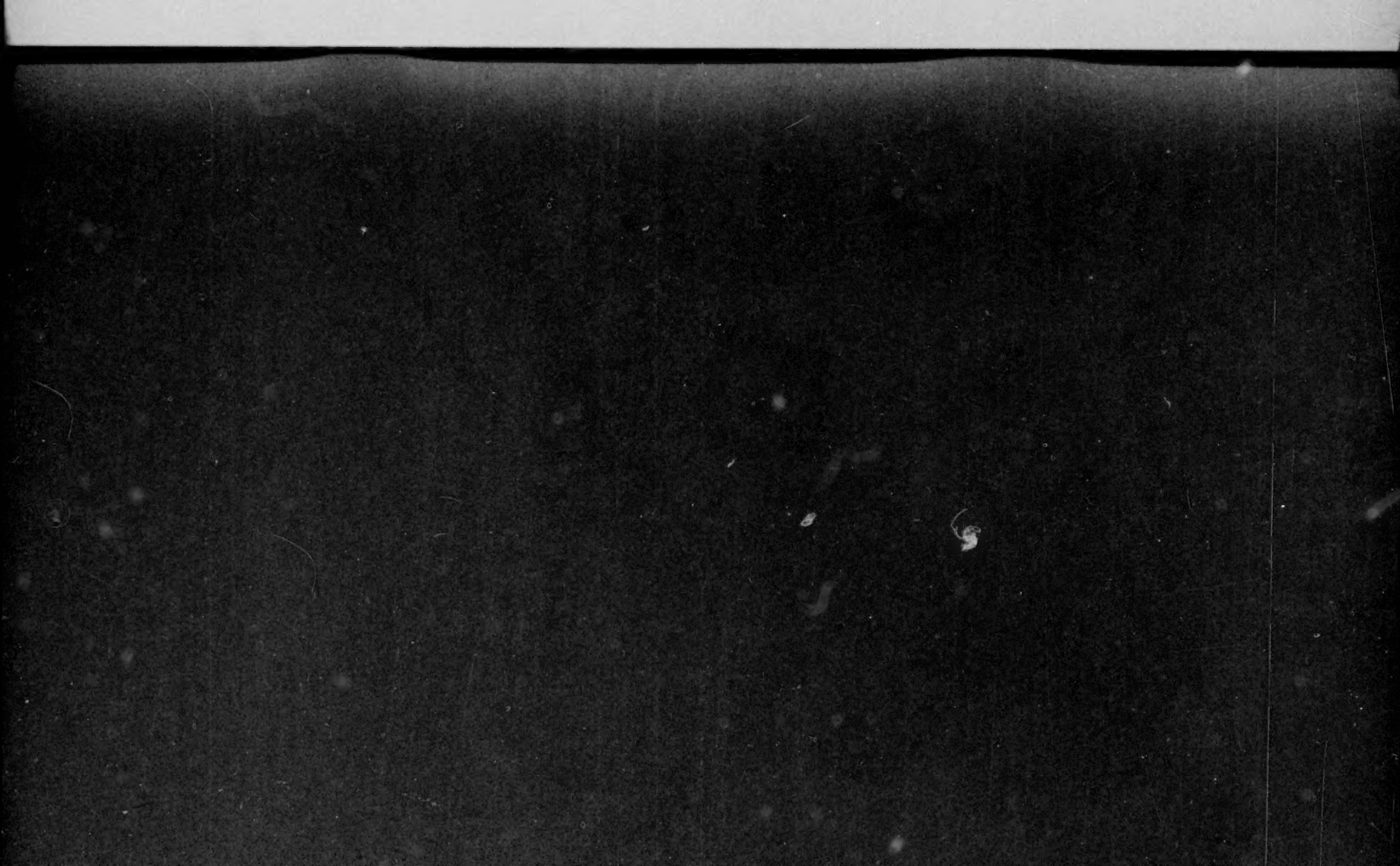

QUESTIONS PRESENTED

Respondent, an alien found deportable because of his criminal conviction, applied for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). The Board of Immigration Appeals (BIA), following an earlier decision of the Attorney General, concluded that he was statutorily ineligible for such relief under amendments to Section 1182(c) made by Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Respondent raised both constitutional and non-constitutional challenges to the BIA's determination by petitioning for review of his deportation order in the court of appeals, and also by petitioning for a writ of habeas corpus in the district court. The court of appeals concluded that Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) deprived it of jurisdiction over respondent's claims, and also concluded that 8 U.S.C. 1252(g) (Supp. II 1996) divested the district court of jurisdiction. The court of appeals further concluded that Section 1252(g) violated the Suspension of Habeas Corpus Clause, U.S. Const. Art. I, § 9, Cl. 2, insofar as it deprived respondent of a judicial forum, and that he should be permitted to proceed in district court under the general federal habeas corpus statute, 28 U.S.C. 2241.

The questions presented are:

1. Whether the court of appeals had jurisdiction to entertain either (i) respondent's challenge to the Attorney General's decision that he is statutorily ineligible for discretionary relief from deportation under 8 U.S.C. 1182(c), or (ii) his constitutional challenge to that provision of the Immigration and Nationality Act.

2. Whether Section 440(a) of AEDPA, Section 309(c)(4)(G) of IIRIRA, and 8 U.S.C. 1252(g) (Supp. II 1996), violate the Suspension of Habeas Corpus Clause of the Constitution.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service (INS) and Rosanne Sonchik, District Director of the INS, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The initial opinion of the court of appeals (App. 25a-47a)[1] is reported at 152 F.3d 1213. An order amending that opinion and the amended opinion reflecting that order (App. 1a-24a) have not yet been reported. The judgment and docket entry of the district court (App. 48a-49a) are unreported, as are the decision and order of the immigration judge (App. 50a-52a) and the

[1] "App." refers to the separately bound appendix to this petition.

decision of the Board of Immigration Appeals (App. 53a-54a).

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 55a-64a) are pertinent portions of the Suspension of Habeas Corpus Clause of the Constitution, Art. I, § 9, Cl. 2; 8 U.S.C. 1105a(a) and 1182(c) (1994), as in effect before and after April 24, 1996; 8 U.S.C. 1252(a) and (g) (Supp. II 1996); Sections 401(e), 440(a), and 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1268, 1276, 1277; Sections 304, 306, and 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-587, 3009-607, 3009-625; and 28 U.S.C. 2241.

STATEMENT

1. This case presents questions about the application and the constitutionality of several major changes to the Nation's immigration laws enacted by Congress in 1996. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by streamlining and channeling judicial review of their deportation orders. Two enactments by Congress are particularly pertinent: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214; and the Illegal Immigration Reform and

Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546.

a. Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could (like other permanent resident aliens) apply to the Attorney General for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). To be eligible for such relief, the alien had to show that he had had a lawful unrelinquished domicile in this country for seven years, and that, if his conviction was for an "aggravated felony," as defined in the Immigration and Nationality Act (INA) at 8 U.S.C. 1101(a)(43) (1994), he had not served a term of imprisonment for that conviction of five years or longer. See 8 U.S.C. 1182(c) (1994).[2] If the Attorney General, in the exercise of her discretion, denied relief, then the alien could challenge that denial by filing a petition for review of his deportation order in the court of appeals. See 8 U.S.C. 1105a(a) (1994) (repealed 1996) (incorporating Hobbs Administrative Orders Review Act, 28 U.S.C. 2341-2351). Under certain circumstances, an alien in custody pursuant to an order of deportation could also seek judicial review thereof by filing a petition for a writ of habeas corpus,

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[2] Although Section 1182(c) by its terms allowed the Attorney General to admit permanent resident aliens who had temporarily proceeded abroad and were returning to their domicile in the United States, it had long been interpreted (in response to the Second Circuit's decision in *Francis* v. *INS*, 532 F.2d 268 (1976)) also to permit the Attorney General to waive the grounds for deportation of lawfully admitted permanent resident aliens who were present in the United States and in deportation proceedings. See *In re Silva*, 16 I.& N. Dec. 26 (BIA 1976); *Gonzalez* v. *INS*, 996 F.2d 804, 806 (6th Cir. 1993); *Ashby* v. *INS*, 961 F.2d 555, 557 & n.2 (5th Cir. 1992); *Tapia-Acuna* v. *INS*, 640 F.2d 223 (9th Cir. 1981).

pursuant to 8 U.S.C. 1105a(a)(10) (1994) (repealed 1996).

b. In 1996, Congress twice restricted both the substantive eligibility of criminal aliens for discretionary relief from deportation and the availability of judicial review of criminal aliens' deportation orders.

i. On April 24, 1996, Congress enacted AEDPA. Section 440(d) of AEDPA, 110 Stat. 1277, amended Section 1182(c) to make certain classes of criminal aliens categorically ineligible for discretionary relief under that Section—including aliens who were deportable because they had been convicted of a controlled substance offense, see 8 U.S.C. 1251(a)(2)(B) (1994). At the same time, AEDPA repealed 8 U.S.C. 1105a(a)(10) (1994), which had permitted aliens in custody pursuant to an order of deportation to obtain judicial review in habeas corpus proceedings, and replaced it with an express *prohibition* of judicial review of deportation orders for aliens who are deportable by reason of having committed certain criminal offenses. AEDPA §§ 401(e), 440(a), 110 Stat. 1268, 1276-1277. Thus, since the enactment of AEDPA, 8 U.S.C. 1105a(a)(10) (1994) has provided that any final order of deportation against an alien who is deportable for having committed one of the disqualifying offenses "shall not be subject to review by any court." 110 Stat. 1276-1277.

ii. On September 30, 1996, Congress enacted IIRIRA, which comprehensively amended the INA. IIRIRA repealed 8 U.S.C. 1182(c) (1994) on a prospective basis, and replaced it with another form of discretionary relief, known as "cancellation of removal." See IIRIRA § 304(b), 110 Stat. 3009-597; 8 U.S.C. 1229b (Supp. II 1996). Certain classes of criminal aliens were made illegible for cancellation of removal. See 8 U.S.C. 1229b(a)(3) and (b)(1)(c) (Supp. II 1996). The can-

cellation of removal provisions, however, were made applicable only to aliens who are placed in removal proceedings on or after April 1, 1997, and therefore do not govern this case. See IIRIRA § 309(a) and (c)(1), 110 Stat. 3009-625. IIRIRA retained 8 U.S.C. 1182(c) (1994) for cases commenced prior to April 1, 1997, including this one; and for those same cases it also retained Section 440(d) of AEDPA, which (as explained above) made certain classes of criminal aliens ineligible for relief under Section 1182(c).

IIRIRA also replaced the INA's judicial review provision in 8 U.S.C. 1105a (1994) with a new 8 U.S.C. 1252 (Supp. II 1996), again for cases in which the administrative proceedings were commenced on or after April 1, 1997. See IIRIRA § 309(c)(1), 110 Stat. 3009-625. The new Section 1252 provides for judicial review of *all* final removal orders in the courts of appeals pursuant to the Hobbs Act, 28 U.S.C. 2341-2351.[3] 8 U.S.C. 1252(a)(1) (Supp. II 1996). Section 1252 also carries forward the preclusion of review in 8 U.S.C. 1105a(a)(10) (1994) (as amended by AEDPA Section 440(a)) by providing that "no court shall have jurisdiction to review any final order of removal against an alien who is removable for having committed" a crime within one of several classes of criminal offenses. 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996). The new Section 1252 further provides, in a paragraph entitled "CONSOLIDATION OF QUESTIONS FOR JUDICIAL REVIEW," that "[j]udicial review of all questions of law and fact, including interpretation and application of

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[3] Congress also provided that, nothwithstanding subsection (b) of 8 U.S.C. 1105a (1994), judicial review of final orders of *exclusion* during the transition period would be in the court of appeals, not in the district court in habeas corpus proceedings. See IIRIRA § 309(c)(4)(A), 110 Stat. 3009-626.

constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section," 8 U.S.C. 1252(b)(9) (Supp. II 1996)—*i.e.*, only in the court of appeals, as provided in Section 1252(a)(1).

Cases (such as this one) in which the administrative proceedings were begun prior to April 1, 1997, continue to be governed by 8 U.S.C. 1105a (1994), as amended by AEDPA. IIRIRA § 309(c)(2), 110 Stat. 3009-625. Even for such cases, however, Congress enacted special rules for any such cases in which the final deportation order is entered on or after October 30, 1996. One of those special rules, in Section 309(c)(4)(G) of IIRIRA, reinforces the preclusion of judicial review in 8 U.S.C. 1105a(a)(10) by providing that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed [specified criminal offenses]." 110 Stat. 3009-626 to 3009-627.

Finally, in IIRIRA, Congress enacted a sweeping jurisdiction-limiting provision, 8 U.S.C. 1252(g) (Supp. II 1996), which provides:

> Except as specifically provided in [8 U.S.C. 1252] and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA].

The new Section 1252(g) is expressly made applicable "without limitation to all claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under [the INA]." IIRIRA § 306(c)(1), 110

Stat. 3009-612 (as amended by Pub. L. No. 104-302, § 2(1), 110 Stat. 3657).

b. After the enactment of these major immigration laws, two important questions arose in immigration proceedings about the scope of Section 440(d) of AEDPA, which bars certain criminal aliens from Section 1182(c) relief. Like many other aliens in deportation proceedings affected by AEDPA and IIRIRA, respondent challenges his deportation order by seeking to litigate both of these questions. The instant case concerns whether either of those challenges may be brought, and if so in what court.

i. First, the question arose as to whether Section 440(d) applies to aliens who had been convicted or placed in deportation proceedings before the enactment of AEDPA. On June 27, 1996, a closely divided Board of Immigration Appeals (BIA) initially decided that Section 440(d) does apply to deportation proceedings that had already been initiated, but that it should not be applied to aliens who had filed applications for Section 1182(c) relief in those proceedings before AEDPA's enactment. *In re Soriano*, Int. Dec. No. 3289 (App. 65a-97a). On September 12, 1996 (before IIRIRA was enacted), the Attorney General, exercising her authority under 8 C.F.R. 3.1(h), vacated the opinion of the BIA in *Soriano* and certified for her decision the question whether Section 440(d) applies to applications filed as of the date of its enactment.[4] App. 98a.

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[4] Also on September 12, 1996, the Solicitor General filed a supplemental brief in this Court in *INS* v. *Elramly*, No. 95-939, addressing the temporal scope of Section 440(d). In that brief, we argued (at 15-18) that Section 440(d) had divested the Attorney General of authority to grant Section 1182(c) relief in pending cases. On September 16, 1996, the Court remanded *Elramly* to the

On February 21, 1997, the Attorney General concluded in *Soriano* that AEDPA Section 440(d) applies to all deportation proceedings pending on the date of enactment, including those in which aliens had already submitted applications for Section 1182(c) relief. App. 99a-112a. Following the analytical framework set forth by this Court in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the Attorney General concluded that application of Section 440(d) to pending deportation cases is not retroactive because it does not "impair a right, increase a liability, or impose new duties on criminal aliens. The consequences of [r]espondent's conduct remain the same before and after the passage of AEDPA: criminal sanctions and deportation." App. 105a-106a. The Attorney General further concluded that Section 440(d) "is best understood as Congress's withdrawal of the Attorney General's authority to grant prospective relief. Thus, the statute alters both jurisdiction and the availability of future relief, and should be applied to pending applications for relief." App. 106a.

ii. Second, the question arose whether Section 440(d) of AEDPA bars the Attorney General from granting Section 1182(c) relief to criminal aliens who temporarily proceeded abroad and are seeking admission to the United States, as well as to criminal aliens in the United States who are in deportation proceedings. The BIA concluded in *In re Fuentes-Campos*, Int. Dec. 3318 (May 14, 1997), and *In re Gonzalez-Camarillo*, Int. Dec. 3320 (June 19, 1997), that Section 440(d) bars relief only for criminal aliens in deportation proceedings.

2. Respondent is a native and citizen of Mexico who entered the United States as the child of a lawful

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court of appeals for further consideration in light of AEDPA. *INS* v. *Elramly*, 518 U.S. 1051 (1996).

permanent resident in 1977. In February 1995, he was convicted in California state court of the offense of being under the influence of a controlled substance. App. 3a. That controlled substance offense rendered him deportable under 8 U.S.C. 1251(a)(2)(B)(i) (1994) (now recodified at 8 U.S.C. 1227(a)(2)(B)(i) (Supp. II 1996)).

On May 17, 1996, after the enactment of AEDPA, the INS issued an Order to Show Cause against respondent, commencing his deportation proceeding. Respondent conceded his deportability and applied to the immigration judge (IJ) for discretionary relief under Section 1182(c). On October 4, 1996, the IJ ruled that, by virtue of Section 440(d) of AEDPA, respondent was ineligible for discretionary relief under Section 1182(c). The IJ concluded that the amendment made to Section 1182(c) by AEDPA Section 440(d) applies to any application for such relief that was not administratively final as of AEDPA's enactment. App. 51a-52a. On March 14, 1997, the BIA dismissed respondent's appeal, relying upon the Attorney General's decision in *Soriano*. App. 53a-54a.

3. On March 26, 1997, respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona. He contended that Section 440(d) violates constitutional equal-protection principles insofar as it is applied to bar the Attorney General from granting Section 1182(c) relief to aliens in deportation proceedings, but not to those returning from a temporary trip abroad.[5] On April 7, 1997, the

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[5] The habeas corpus petition did not raise the claim that application of AEDPA Section 440(d) to respondent's case would be impermissibly retroactive. At the hearing on his motion for a temporary restraining order, respondent sought leave to amend his complaint to include such a claim. See 4/7/97 Tr. 13.

district court dismissed respondent's petition for lack of jurisdiction, concluding that any challenge to his deportation order had to be presented to the court of appeals. App. 48a-49a; 4/7/97 Tr. 27-28.

4. Respondent appealed to the court of appeals from the dismissal of his habeas corpus petition, and also filed directly in the court of appeals a petition for review of the BIA's decision, pursuant to 8 U.S.C. 1105a (1994). In the court of appeals, he renewed the equal-protection challenge to Section 440(d), and also argued that application of Section 440(d) to his case would be impermissibly retroactive. The court of appeals consolidated the two cases. It dismissed the petition for review for lack of jurisdiction, and it reversed the dismissal of the habeas corpus petition and remanded that case to the district court for further proceedings on the merits. App. 1a-24a.

a. As to the petition for review, the court concluded that its jurisdiction had been ousted by Section 309(c)(4)(G) of IIRIRA. App. 6a-8a. The court noted that, although Section 309(c)(4)(G) states that "there shall be no appeal" in the case of an alien deportable because of criminal convictions like respondent's, the government had conceded that the court of appeals retained jurisdiction to review the Attorney General's determination that the petitioner is in fact an alien, and that the alien's criminal offense is among the statutorily enumerated ones ousting judicial review. App. 7a. But because respondent's contentions—including his challenge to the constitutionality of the amendment to Section 1182(c)—were not within that limited class of claims, the court concluded that they were not within the scope of its jurisdiction on direct appeal from the BIA's decision. App. 8a. The court did not address whether Section 309(c)(4)(G) of IIRIRA should be

construed to permit his constitutional challenge to a provision of the INA itself to be raised in a petition for review to the court of appeals.

b. As to the petition for a writ of habeas corpus, the court of appeals ruled that the district court had jurisdiction over respondent's claims under the general federal habeas corpus statute, 28 U.S.C. 2241. App. 9a. In reaching that result, the court held that Section 1252(g), which generally precludes district court jurisdiction over challenges to deportation orders, is unconstitutional as applied to cases like this one, where (in the court's view) the alien would otherwise have no opportunity for judicial review of his challenges in either the court of appeals or the district court. App. 18a-19a.

In concluding that, without Section 2241, respondent would have no judicial forum for any of his claims, the court relied on its earlier decision in *Hose* v. *INS*, 141 F.3d 932 (9th Cir. 1998) (petition for rehearing pending). In *Hose*, an alien ordered excluded from the United States for lack of a valid visa filed a petition for a writ of habeas corpus in district court, instead of a petition for review in the court of appeals. *Id.* at 933-934. The court of appeals ruled in *Hose* that, in Section 1252(g), Congress had withdrawn the district court's jurisdiction to hear the case—notwithstanding that Hose had attempted to invoke the court's habeas corpus jurisdiction under Section 2241—and that Hose's sole avenue for judicial review was by petition for review filed directly in the court of appeals. *Id.* at 935-936. The *Hose* panel also rejected the contention that the result in that case violated the Suspension of Habeas Corpus Clause, Art. I, § 9, Cl. 2, because, it stated, "Congress has not attempted to preclude all federal court review of orders to exclude or remove

aliens. Rather it has provided a streamlined approach for consideration by the courts of appeals of claims arising from those orders and the procedures leading to them." *Id.* at 936.

The panel in this case stated that respondent's habeas petition "arises under polar opposite conditions" from those in *Hose*, because (it believed) respondent had raised colorable constitutional claims but had no judicial avenue, save habeas corpus, in which to present them: Section 309(c)(4)(G) of IIRIRA, it concluded, closes the court of appeals, and Section 1252(g) closes the district court. App. 11a. "In short, if we apply [Section 1252(g)] as construed by *Hose* to [respondent], he has no means of judicial review." *Ibid.* (footnote omitted).

The court then considered whether that result would violate the Suspension of Habeas Corpus Clause. After reviewing the history of habeas corpus in the immigration context (App. 13a-17a),[6] the court concluded that

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[6] The court noted that the "traditional Great Writ was largely a remedy against executive detention." App. 12a (citation omitted). It observed that, after passage of the Chinese Exclusion Act of 1882, which forbade the immigration of certain Chinese laborers for ten years, some Chinese nationals contested their deportation under the Act on the ground that they were already residents of this country or otherwise outside the Act's reach; the courts concluded that they had jurisdiction by habeas corpus to test the legality of the executive's efforts to deport or exclude the Chinese under the Exclusion Act. App. 13a-14a. Further, the court observed, although this Court had held that Congress, in the Immigration Act of 1917, had precluded all judicial review of discretionary deportation decisions by executive authorities, and that such preclusion was constitutional, the Court had also reaffirmed, in *Heikkila* v. *Barber*, 345 U.S. 229, 234-235 (1953), that an alien might test the legality of his deportation order by habeas corpus, even though Congress had "preclud[ed] judicial interven-

"the answer must plainly be in the affirmative" because "elimination of all judicial review of executive detention violates the Constitution." App. 19a.

Having decided that the Constitution required that at least some avenue of judicial review remain available to respondent, the court of appeals then considered what the scope of such review must be. App. 19a. It noted that this would be a "thorny problem" if Congress had repealed 28 U.S.C. 2241, because then the court would be required to define the contours of a "free standing" constitutional writ of habeas corpus. App. 20a. "Fortunately," the court stated, "we are not confronted with that circumstance," because neither AEDPA nor IIRIRA expressly referred to 28 U.S.C. 2241, and thus it reasoned "[t]he base habeas statute, 28 U.S.C. § 2241, * * * remains." App. 20a. The court of appeals recognized that under the Ninth Circuit's binding precedent in *Hose*, Section 1252(g) "forfended access to relief under 28 U.S.C. § 2241" in immigration cases. But the court concluded that that effect of Section 1252(g) violated the Suspension Clause in this case, and so its "impediment to the general habeas remedies of 28 U.S.C. § 2241 is removed for [respondent] and those similarly situated." App. 20a-21a. "Thus, because Congress has chosen to implement the general right of habeas relief through 28 U.S.C. § 2241," the court "conclude[d] that to the extent habeas remedies in immigration cases are protected by the Suspension Clause, relief is afforded through the statutory remedy of 28 U.S.C. § 2241." App. 21a.[7]

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tion in deportation cases except insofar as it was required by the Constitution." App. 15a-16a.

[7] The court found its conclusion to be consistent with "the requirement that judicial review of constitutional claims not be foreclosed." App. 21a (citing *Webster* v. *Doe*, 486 U.S. 592, 603

The court of appeals then held that both claims raised by respondent fell within the scope of 28 U.S.C. 2241. On that ground alone, it held that both claims could be heard by the district court in habeas corpus proceedings, without analyzing whether the Suspension Clause *required* that result for either claim. In the court's view, respondent "has made a colorable argument that his deportation would violate the Equal Protection and Due Process Clauses, and that his deportation is forbidden by United States statute." App. 22a. The court found these claims to be distinguishable from challenges to purely discretionary decisions, "which some courts have held [fall] outside the scope of section 2241." *Ibid.* (citing *Ter Yang* v. *INS*, 109 F.3d 1185, 1195 (7th Cir.), cert. denied, 118 S. Ct. 624 (1997)).[8] Accordingly, the court remanded respondent's constitutional and statutory claims to the district court for further proceedings on the merits. App. 24a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that 8 U.S.C. 1252(g) (Supp. II 1996) violates the Suspension of Habeas Corpus

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(1988)). The court believed that, as construed in *Hose*, Section 1252(g) would prevent respondent "from presenting his constitutional claims before any tribunal, administrative or judicial." App. 21a.

[8] The court rejected the INS' argument that, even if review could be had under 28 U.S.C. 2241, the habeas petition should be heard and decided by the court of appeals rather than the district court. App. 23a-24a. The court acknowledged concerns about "a bifurcated system of review," but it suggested that such "bifurcated review of immigration matters has been the norm, not the exception." App. 23a. Moreover, the court stated, the district court's fact-finding capabilities were superior to those of the court of appeals, and respondent's petition "raises factual questions which are best committed to the wisdom of the district court for resolution." App. 23a-24a.

Clause because, the court believed, that provision eliminates all judicial review for essentially all challenges that criminal aliens such as respondent might seek to make to their deportation orders. The decision by a lower court that an Act of Congress is unconstitutional, by itself, warrants this Court's review. See *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 425 (1993). Moreover, this case presents particularly compelling circumstances for review: the decision rests on a potentially far-reaching misreading of the immigration statutes before the court that needlessly placed those statutes in constitutional doubt; it mandates circumvention of the statutory scheme that was specifically designed by Congress to channel all judicial review of deportation matters to the courts of appeals; it frustrates Congress's clear intent that deportation proceedings specifically for criminal aliens (including judicial review thereof) be streamlined; it affects a large number of pending and future proceedings involving criminal aliens; and it touches on the federal government's power over immigration, a matter traditionally reserved for the judgment of the political Branches. This case also raises issues closely related to those presented in *Goncalves* v. *Reno*, 144 F.3d 110 (1st Cir. 1998), in which we are simultaneously fiiing a petition for a writ of certiorari.

1. Certiorari is warranted in this case to review "the exercise of the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). The nature of the statutory scheme declared unconstitutional imbues this case with particular significance, for it touches on powers uniquely within the plenary authority of Congress under the Constitution. Congress's specification of the manner and extent to which orders of deportation are subject to judicial re-

view implicates its authority over immigration matters generally, a subject concerning the Nation's sovereignty. "[T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government," and "[o]ver no conceivable subject is the legislative power of Congress more complete." *Reno* v. *Flores*, 507 U.S. 292, 305 (1993) (internal quotation marks omitted).

In addition, the statutes at issue here implicate Congress's power to "constitute Tribunals inferior to the supreme Court." U.S. Const. Art. I, § 8, Cl. 9; see also Art. III, § 1 ("Congress may from time to time ordain and establish" inferior federal courts). "Congress has the constitutional authority to define the jurisdiction of the lower federal courts," *Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993), and once it has defined that jurisdiction, the limits it has established "must be neither disregarded nor evaded." *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1978).

2. The court of appeals' constitutional ruling rests on a misreading of Section 309(c)(4)(G) of IIRIRA that creates needless constitutional doubt.[9] Section

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[9] As we have explained above (see p. 6, *supra*), Section 309(c)(4)(G) of IIRIRA supplements and reinforces the amendment made to 8 U.S.C. 1105a(a)(10) by Section 440(a) of AEDPA, which provides that a deportation order entered against an alien who is deportable by reason of having committed a criminal offense falling in any of several categories "shall not be subject to review by any court." 110 Stat. 1276-1277. Although AEDPA Section 440(a) and IIRIRA Section 309(c)(4)(G) apply only to immigration proceedings commenced before April 1, 1997, their permanent replacement, 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996), is substantively identical. Thus, courts in the future are likely to construe Section 1252(a)(2)(C) in light of the courts of appeals' construction of its predecessor provisions, just as the courts of appeals have issued

309(c)(4)(G) provides that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed" certain criminal offenses, including respondent's offense. The court of appeals read that language as eliminating review of *all* claims by criminal aliens such as respondent, even challenges to the constitutionality of a provision of the INA itself.[10] Section 309(c)(4)(G), however, did not eliminate all review of all possible challenges by criminal aliens to their deportation orders. For example, as the court of appeals acknowledged in this case (App. 7a), Section 309(c)(4)(G), like Section 440(a) of AEDPA,

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conforming constructions of AEDPA Section 440(a) and IIRIRA Section 309(c)(4)(G). See App. 7a-8a (relying on *Ter Yang* v. *INS*, 109 F.3d 1185, 1192 (7th Cir.), cert. denied, 118 S. Ct. 624 (1997), and *Duldulao* v. *INS*, 90 F.3d 396 (9th Cir. 1996)); see also *Goncalves* v. *Reno*, 144 F.3d 110, 116-117 (1st Cir. 1998) (similarly relying on *Kolster* v. *INS*, 101 F.3d 785 (1st Cir. 1996), and *Santos* v. *INS*, 124 F.3d 64 (1st Cir. 1997)), petition for cert. pending (filed Nov. 18, 1998).

[10] The court of appeals suggested (App. 17a) that this construction was required by its previous decision in *Hose*, which it read as holding that "all forms of judicial review in immigration cases" are eliminated in cases like this one. The court misread *Hose*, which held only that a non-criminal alien who could file a petition for review of her deportation order in the court of appeals could not, because of Section 1252(g), proceed in district court under the district court's habeas jurisdiction. See 141 F.3d at 934-935. *Hose* did not address the scope of jurisdiction that a court of appeals might retain over petitions for review filed by criminal aliens, even after enactment of AEDPA and IIRIRA. The court also overlooked language in *Hose* stating that "Section 1252 gives this court jurisdiction to hear those claims by way of a petition for review of a final order of removal." *Id.* at 935. The alien has filed a petition for rehearing in *Hose*, which is still pending. The government informed the court of appeals, in response to that petition for rehearing, that it intended to file a petition for a writ of certiorari in this case.

permits a court of appeals to entertain a petition for review to the extent the petitioner contends that he does not fall within the category of aliens for whom judicial review is precluded—*e.g.*, to review a contention that the petitioner is not an alien, that he was not convicted of the offense on which his deportation was based, or that that offense is not one for which judicial review is barred. That is so because the court of appeals has jurisdiction to determine its own jurisdiction, *i.e.*, to conclude whether respondent actually falls within the class of aliens for whom judicial review is precluded. See also *Ter Yang* v. *INS*, 109 F.3d at 1192; *Coronado-Durazo* v. *INS*, 123 F.3d 1322 (9th Cir. 1997) (petition for rehearing pending); but see *Berehe* v. *INS*, 114 F.3d 159, 161 (10th Cir. 1997) (concluding that Section 309(c)(4)(G) does not permit review of deportability).

Similarly, in our view, neither Section 440(a) of AEDPA nor Section 309(c)(4)(G) of IIRIRA withdrew from the courts of appeals their established authority to consider constitutional challenges to a provision of the INA itself—challenges that the BIA has no authority to adjudicate. Compare *Johnson* v. *Robison*, 415 U.S. 361, 373-374 (1974). See, *e.g.*, *INS* v. *Chadha*, 462 U.S. 919, 938-939 (1983) (holding that the court of appeals could entertain a constitutional challenge to a statutory legislative veto provision affecting a deportation order); see also *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976) (holding that Section 1182(c) violates equal protection insofar as it is made available to only some deportable aliens and not others similarly situated); *Perez-Oropeza* v. *INS*, 56 F.3d 43, 45-46 (9th Cir. 1995) (no equal protection violation in limiting eligibility for waiver of deportation); *Raya-Ledesma* v. *INS*, 42 F.3d 1263, 1265 (9th Cir. 1994) (no equal protection violation regarding

seven-year requirement for Section 1182(c) relief).[11] Thus, while there is no doubt that Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA were intended to place significant restrictions on the courts of appeals' authority to review the merits of deportation orders entered against criminal aliens, a criminal alien may, as before, raise a constitutional challenge to a provision of the INA. The court of appeals therefore erred in construing Section 309(c)(4)(G) as precluding review of respondent's constitutional challenge to 8 U.S.C. 1182(c), as amended by Section 440(d) of AEDPA, to exclude from eligibility certain criminal aliens in deportation but not in exclusion proceedings.[12]

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[11] This case does not require the Court to consider whether courts of appeals may adjudicate any other constitutional claims by criminal aliens on petitions for review, notwithstanding the preclusions of review in AEDPA and IIRIRA. Cf. *Webster* v. *Doe*, 486 U.S. 592, 603 (1988).

[12] The court of appeals suggested (App. 23a) that respondent's petition "raises factual questions which are best committed to the wisdom of the district court for resolution." We do not agree that respondent's challenge to the constitutionality of Section 1182(c) (or his challenge to the Attorney General's interpretation of it) requires factual determinations; but even if we assume otherwise, the mechanism established by Congress, channeling all review to the court of appeals, nonetheless presents no constitutional difficulty. As we explain in our brief (at 44-49) and reply brief (at 12-17) in *Reno* v. *American-Arab Anti-Discrimination Committee*, No. 97-1252 (argued Nov. 4, 1998), under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341-2351, which governs review of deportation orders in the courts of appeals, see 8 U.S.C. 1105a(a) (1994; repealed 1996); 8 U.S.C. 1252(a)(1) (Supp. II 1996), the court of appeals may transfer the proceedings to a district court for fact-finding whenever a genuine issue of material fact is presented. 28 U.S.C. 2347(b)(3). Thus, there is an adequate judicial mechanism to make any factual determinations that might be required for resolution of any substantial constitutional claim by a criminal alien that may be presented in a petition for review.

Because judicial review of a criminal alien's constitutional challenge to Section 1182(c) is available in the court of appeals on petition for review, the court of appeals' constitutional concerns about the suspension of the writ of habeas corpus are without substance. Even though the traditional writ of habeas corpus is no longer available for review of deportation orders, including those entered against criminal aliens like respondent, the alternative remedy supplied by Congress is adequate for the consideration of respondent's constitutional claim. See *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977) (Congress may substitute alternative review procedures in place of habeas corpus).

Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA do not, however, permit the court of appeals to consider the particular non-constitutional claim made by respondent here—namely, that the Attorney General erroneously interpreted Section 440(d) of AEDPA in concluding that the amendment it made to Section 1182(c) rendered him ineligible for discretionary relief from deportation. Nor could that claim be presented to the district court, for Section 1252(g) has withdrawn the district court's authority to hear such claims as well. But that particular claim also does not fall within whatever scope of the habeas corpus remedy is preserved by the Suspension of Habeas Corpus Clause. Even if (as we assume for present purposes) the Clause does require a mechanism of judicial review of some non-constitutional issues, respondent's claim is not among the ones for which judicial review must be preserved. Respondent does not contend that his deportation would be *ultra vires*; thus, he does not argue that he is not an alien, that he was not convicted of the criminal offense on which his deportation is based, or that he has been held to be deportable for having been

convicted of an offense that does not actually render him deportable under the INA. Indeed, respondent conceded his deportability. Rather, he argues that the Attorney General has erred in finding him to be ineligible for discretionary relief from a concededly proper deportation.[13]

This Court has never held that such a claim of error is within the constitutional core of the Great Writ that must be preserved under the Suspension of Habeas Corpus Clause. To the contrary, the Court has described the Attorney General's discretionary power to grant a dispensation from deportation as an "act of grace" which is accorded pursuant to her "unfettered discretion," similar to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." See *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (quoting *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956)). Although Congress could subject the Attorney General's decisions relating to the exercise of that discretion—including her eligibility decisions—to judicial review, and has done so in the past, it eliminated such review in AEDPA and IIRIRA. The court of appeals therefore erred in concluding that the Suspension of Habeas Corpus Clause would be violated if respondent is not afforded a judicial forum for review of that claim.

3. The result of the Ninth Circuit's decision in this case is that criminal aliens—but only criminal aliens—may proceed in district court under 28 U.S.C. 2241 to test the validity of their deportation orders, whereas all other aliens must file petitions for review in the court of appeals. Cf. *Hose*, 141 F.3d at 935 (holding that non-

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[13] Respondent does not even contend that the Attorney General could not permissibly exercise her discretion to deny him relief from deportation under Section 1182(c) if he were not statutorily barred from eligibility for that relief.

criminal alien must file in court of appeals directly). That result not only frustrates Congress's intent that review of criminal aliens' deportation proceedings be streamlined and limited; it turns Congress's scheme on its head. It is scarcely conceivable that Congress would have intended criminal aliens to have *greater* opportunities for judicial review (and delay) of their deportation orders than all other aliens. See *Foti* v. *INS*, 375 U.S. 217, 224 (1963) (noting that "[t]he fundamental purpose behind [placing exclusive review in the courts of appeals] was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts"); see also *Stone* v. *INS*, 514 U.S. 386, 399 (1995).

Under the general review provisions of the INA, an alien challenging his deportation order must file a petition for review in the court of appeals, within 30 (previously 90) days after issuance of the final order of removal. See 8 U.S.C. 1252(b)(1) (Supp. II 1996); 8 U.S.C. 1105a(a)(1) (1994; repealed 1996). Further, the court of appeals is directed to consolidate the petition for review of the deportation order with any petition for review of the denial of any motion to reopen or reconsider the deportation order. See 8 U.S.C. 1252(b)(6) (Supp. II 1996). Such motions have been frequently filed by aliens and, in the past, have frequently led to delays in deporting them. See *Stone* v. *INS*, 514 U.S. at 399-400. And of course, any decision by the court of appeals is final, subject only to further review in this Court.

Aliens proceeding in district court under 28 U.S.C. 2241 would have markedly greater opportunities for delay than those proceeding in the court of appeals.

First, 28 U.S.C. 2241 contains no express time limit on the filing of a petition for a writ of habeas corpus. Thus, an alien could delay his deportation by withholding the filing for habeas corpus until his deportation warrant was executed and his departure was imminent. Second, 28 U.S.C. 2241 does not require consolidation of challenges to deportation orders with challenges to motions to reopen or reconsider. Third, an alien who was unsuccessful in district court could appeal to the court of appeals, and thereafter seek review in this Court. Inevitably, therefore, permitting criminal aliens to proceed in district court under 28 U.S.C. 2241 would make the entire process of judicial review of those aliens' deportation orders longer than the process of reviewing non-criminal aliens' deportation orders.

That unlikely result demonstrates why Congress could not have intended criminal aliens to retain access to district courts under 28 U.S.C. 2241. The most harmonious reading of IIRIRA is that Congress intended all claims for which the INA allows judicial review (or the Constitution requires it) to be presented to the court of appeals, on petition for review. As we have explained, Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA allow for judicial review of the fundamental statutory issues concerning the deportability of a criminal alien, and 8 U.S.C. 1252(b)(9) (Supp. II 1996) makes clear that any constitutional challenges an alien may make to his removal are to be consolidated with statutory challenges. The court of appeals recognized that its holding created a "bifurcated system of review," but it believed that "bifurcated review of immigration matters has been the norm, not the exception." App. 22a. That statement rests on a serious misunderstanding of the history of the Nation's immigration laws, as well as the effect of Congress's

amendments to the INA in 1961. More fundamentally for present purposes, however, it is directly contrary to Congress's determination in AEDPA and IIRIRA to eliminate any remaining traces of bifurcated review.[14]

Finally, although we do not believe that a judicial forum is required for the particular non-constitutional claim raised by respondent in this case, at a minimum the court of appeals should have held that that claim could be addressed only in the court of appeals on petition for review, and not in the district court on habeas corpus proceedings. Such a construction of

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[14] Former Section 1105a, requiring review of deportation orders in the courts of appeals, was added to the INA precisely because Congress was dissatisfied with the bifurcated system of review that resulted from this Court's decision in *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955), permitting aliens to proceed in district court. See H.R. Rep. No. 1086, 87th Cong., 1st Sess. 22, 27-28 (1961); *Foti*, 375 U.S. at 225. Congress did in 1961 preserve a limited role for the district court to issue writs of habeas corpus in the deportation context, but only for aliens held in custody. See 8 U.S.C. 1105a(a)(10) (1994). And, as we have explained (p. 4, *supra*), Congress repealed that habeas corpus provision of Section 1105a in 1996.

The court of appeals erroneously relied on *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 216 (1968), for the conclusion that bifurcated review is commonplace in immigration matters. *Cheng Fan Kwok*, however, concerned the alien's opportunity to seek judicial review of an issue that is separate from and not merged into his deportation order, namely, the denial of a stay of deportation by an INS District Director. As the Court explained in *Cheng Fan Kwok*, such matters were *not* governed by former Section 1105a, which placed review of deportation orders in the courts of appeals. That decision has no relevance to the matter at issue here, a challenge to a deportation order itself; Congress has made it clear that the proper forum for such challenges is the court of appeals. See also *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 196-197 (1980) (bifurcated schemes of judicial review of agency action are disfavored).

Section 309(c)(4)(G) would be far more harmonious with Congress's general design in IIRIRA than is the result reached by the court of appeals. Cf. *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1973) ("It is well established that our task in interpreting separate provisions of a single Act is to give the Act the most harmonious, comprehensive meaning possible in light of the legislative policy and purpose.") (internal quotation marks omitted).

4. The importance of this case is underscored by the large number of aliens nationwide who are in a situation similar to respondent's. Approximately 466 petitions for review have been filed in the courts of appeals and 376 petitions for a writ of habeas corpus have been filed in the district courts in which criminal aliens have challenged the BIA's denial of Section 1182(c) relief to them based on the application of Section 440(d) of AEDPA. There are also about 2600 administrative cases still pending in which the issue of the temporal scope of Section 440(d) may be dispositive of the alien's deportation proceeding, and about 5400 others in which the BIA has dismissed an alien's appeal based on *Soriano* (and which the aliens might now seek to challenge by filing a habeas corpus petition). In addition, there are currently at least 23,000 removable aliens held in federal prisons and 54,000 removable aliens incarcerated in state prisons. Once those aliens are placed in removal proceedings, many of them may claim, as respondent has claimed in this case, that neither AEDPA nor IIRIRA is applicable to their case because their convictions were entered before the effective date of AEDPA, and so their eligibility for Section 1182(c) relief should be judged under pre-AEDPA law. And they may seek to raise that and other claims by filing a habeas corpus petition in district court. The

impact of the decision below threatens to be especially severe, because close to one-half of all immigration cases traditionally arise in the Ninth Circuit.[15]

We also note that even aliens convicted in the future of criminal offenses and deportable on that ground may be affected by this case. Such criminal aliens who are ineligible for cancellation of removal under 8 U.S.C. 1229b (Supp. II 1996) may nonetheless seek to raise constitutional and statutory challenges to their orders of removal. Because, as we have explained (note 9, *supra*), courts are likely to construe the jurisdiction-limiting provisions applicable to criminal aliens in new Section 1252(a)(2)(C) in conformity with judicial constructions of Section 309(c)(4)(G) of IIRIRA and Section 440(a) of AEDPA, it is likely that criminal aliens in the future, if allowed to do so, will proceed in district court under Section 2241 rather than the court of appeals.

Further, other courts of appeals have agreed with the court below that criminal aliens may *not* challenge the denial of Section 1182(c) relief on any ground in a petition for review in the court of appeals, but that they may raise both constitutional and statutory challenges in a petition for a writ of habeas corpus in district court under 28 U.S.C. 2241. See *Goncalves* v. *Reno*, 144 F.3d 110 (1st Cir. 1998), petition for cert. pending (filed Nov. 18, 1998); *Henderson* v. *INS*, 157 F.3d 106 (2d Cir. 1998); see also *Lerma de Garcia* v. *INS*, 141 F.3d 215, 217 (5th Cir. 1998) (dismissing petition for review for lack of jurisdiction, but reaffirming that "criminal

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[15] Of the approximately 460 petitions for review that have been filed by criminal aliens in which the temporal application of Section 440(d) is at issue, 242 have been filed in the Ninth Circuit. About 30 petitions for a writ of habeas corpus raising the Section 440(d) issue have been filed in district courts in the Ninth Circuit.

deportees retain some opportunity to apply for writs of habeas corpus"); *Mansour* v. *INS*, 123 F.3d 423, 426 (6th Cir. 1997) (similar). Although the *Goncalves* and *Henderson* courts did not frame their rulings in constitutional terms, as did the court below, their conclusions that district court proceedings under 28 U.S.C. 2241 remain open to criminal aliens were strongly influenced by the perceived possibility of a constitutional violation should they have reached a contrary conclusion. The Seventh Circuit, however, has disagreed with the proposition that aliens may proceed under Section 2241, and has suggested that Congress repealed the applicability of Section 2241 in immigration cases entirely—with the result that, to the extent that judicial review is constitutionally required, such review must be provided under the "free standing" constitutional writ of habeas corpus. See *Ter Yang* v. *INS*, 109 F.3d at 1195; but see *Turkhan* v. *INS*, 123 F.3d 487, 490 (7th Cir. 1997) (apparently suggesting that review may remain available under Section 2241). This divergence of views among the courts of appeals about such an important subject warrants this Court's review.

5. For the reasons given above and in our certiorari petition in *Reno* v. *Goncalves*, which we are filing simultaneously with the petition in this case, the question whether district courts may review deportation orders in habeas corpus proceedings under 28 U.S.C. 2241 is of substantial and recurring importance in the administration of the immigration laws. Review of that issue by this Court therefore is warranted.

On November 4, 1998, this Court heard argument in *Reno* v. *American-Arab Anti-Discrimination Committee* (*AADC*), No. 97-1252, which involves related questions concerning whether the district courts retain any jurisdiction to review deportation matters after

AEDPA and IIRIRA, and specifically concerns the scope of 8 U.S.C. 1252(g) (Supp. II 1996). As we explain in our petition in *Goncalves* (at 28-29), however, *AADC* does not specifically involve the continued availability of the writ of habeas corpus or any question arising under the Suspension of Habeas Corpus Clause. As we further explain in our petition in *Goncalves* (at 29), a decision by this Court resolving that question is necessary this Term because of the widespread and disruptive litigation in the lower courts on that question (and on the underlying issues concerning the availability of relief to criminal aliens under Section 1182(c)). We therefore suggest that the Court not hold the petitions in *Goncalves* and this case pending its decision in *AADC*.

If the Court were to grant review in only one of these two cases, we suggest that it grant review in *Goncalves* and hold the petition in this case. The First Circuit in *Goncalves*, after deciding that the district court had habeas corpus jurisdiction under 28 U.S.C. 2241, went on to hold on the merits that the amendment made to Section 1182(c) by Section 440(d) of AEDPA should not be applied "retroactively" to aliens who filed applications for relief prior to AEDPA's enactment. That rejection of the Attorney General's considered judgment independently warrants this Court's review, if the Court rejects our submission that no court (including a district court in habeas corpus proceedings under 28 U.S.C. 2241) has jurisdiction to consider the issue.

We urge, however, that the Court grant review in this case as well as in *Goncalves*. The Ninth Circuit in this case held a provision of the INA (8 U.S.C. 1252 (Supp. II 1996)) unconstitutional. Moreover, the decision of the Ninth Circuit was rendered in two cases that were consolidated in that court: respondent's direct

petition for review of his deportation order in that court, and his appeal from the district court's dismissal of his petition for a writ of habeas corpus. Review of the Ninth Circuit's decision in this case along with the First Circuit's decision in *Goncalves* therefore would allow this Court to render a definitive holding regarding the jurisdiction of *both* the courts of appeals *and* the district courts in cases like these, while preserving the Court's ability to resolve the temporal scope of Section 440(d) of AEDPA if it concludes that the district court in *Goncalves* did have jurisdiction to consider that issue in habeas corpus proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

IMMIGRATION AND NATURALIZATION SERVICE AND ROSANNE SONCHIK, DISTRICT DIRECTOR, PETITIONERS

v.

DANIEL MAGANA-PIZANO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 97-15678, 97-70384
INS No. A35-822-607
D.C. No. CV 97-00619 SMM

DANIEL MAGANA-PIZANO, PETITIONER-APPELLANT

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE

Argued and Submitted Aug. 12, 1997

Filed Sept. 1, 1998
Amended Nov. 13, 1998

Appeal from the United States District Court for the District of Arizona;

Stephen M. McNamee, District Judge, Presiding and

A Petition for Review of An Order of the Board of Immigration Appeals

Before: GOODWIN and THOMAS, Circuit Judges, PREGERSON,* District Judge.

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* The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

ORDER

It is ordered that the opinion filed on September 1, 1998, be amended to delete the paragraph at page 5, as reported in 152 F.3d 1213 at 1215, which states:

> Petitions for review filed between the passage of IIRIRA on September 30, 1996, and IIRIRA's general effective date of April 1, 1997, are governed by iterim transitional rules. See IIRIRA § 309(c); *Kalaw* v. *INS*, 133 P.3d 1147, 1150 (9th Cir. 1997).

In lieu thereof, the following language is hereby substituted:

> Immigration proceedings initiated by the INS before IIRIRA's general effective date of April 1, 1997, in which a final deportation or exclusion order was filed after October 30, 1996, are governed by interim transitional rules. *See* IIRIRA § 309(c); *Kalaw* v. *INS*, 133 F.3d 1147, 1150 (9th Cir. 1997).

OPINION

PER CURIAM:

With enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Congress dramatically altered our immigration laws and judicial remedies for immigrants facing deportation or exclusion. To consider the proper jurisdiction for habeas corpus petitions and petitions for review of Board of Immigration Appeals decisions under the new statutes, we consolidated these actions. We dismiss the petition for review for lack of

jurisdiction, but hold that the petitioner may pursue habeas corpus relief under 28 U.S.C. § 2241 in the United States District Court.

I

Daniel Magana-Pizano is a 25-year old native and citizen of Mexico who entered the United States on December 28, 1977, as the five-year old child of a lawful permanent resident. Magana-Pizano's parents and three of his siblings are lawful permanent residents of the United States; his fourth sibling is a United States citizen. Since his admission into the United States, Magana-Pizano has resided in Southern California and Arizona. He attended high school in the United States, and most recently worked as a fork lift operator.

His past includes a criminal history, albeit for mostly minor offenses. Relevant to this appeal, he was convicted in February 1995 in a California state court of being under the influence of cocaine and methamphetamine in violation of section 11550(a) of the California Health and Safety Code, a misdemeanor offense.

On May 17, 1996, the Immigration and Naturalization Service ("INS") issued an Order to Show Cause[1] to Magana-Pizano alleging that he was deportable as a

[1] The Order to Show Cause alleged that Magana-Pizano was deportable under INA § 241(a)(2)(B)(i), codified at 8 U.S.C. § 1251 (1994) (redesignated by IIRIRA § 305(a)(2) as INA § 237(a)(2)(i), to be codified at 8 U.S.C. § 1227(a)(2)(B)(i) (Supp. II 1996)). This section provides that "[a]ny alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is deportable."

result of this misdemeanor criminal conviction. At his deportation hearing, Magana-Pizano conceded his deportability as a result of the drug conviction, but indicated that he would apply for a discretionary waiver of deportation under Section 212(c) of the Immigration and Nationality Act ("INA").

Unbeknownst to Magana-Pizano, Congress had already passed AEDPA, Pub.L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 22, 28, 40, 42, 50 U.S.C.). Section 440(d) of AEDPA amended INA § 212(c) to eliminate discretionary relief for aliens convicted of most drug-related crimes, including Magana-Pizano's.[2] As a result of this statutory change, the INS filed a motion to pretermit Magana-Pizano's application for relief under INA

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[2] Section 440(d) of AEDPA modifies 8 U.S.C. § 1182(c) to provide that the Attorney General no longer has the authority to waive deportation of aliens convicted of certain crimes, such as those involving controlled substances. It provides:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(c)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 1251(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1251(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 1251(a)(2)(A)(i) of this title.

§ 212(c), arguing that section 440(d) of AEDPA and its amendment to section 212(c) were effective as of the date of passage on April 24, 1996. These changes provided that any alien who, like Magana-Pizano, was deportable due to a criminal conviction under 8 U.S.C. § 1251(a)(2)(B), was statutorily ineligible for discretionary relief.

The Immigration Judge granted the INS motion to pretermit Magana-Pizano's application and ordered Magana-Pizano deported to Mexico. Magana-Pizano appealed this decision to the Board of Immigration Appeals ("BIA"), which sustained the deportation order based on AEDPA changes to INA § 212(c), and the Attorney General's opinion in *Matter of Soriano*, Int. Dec. 3289 (A.G. Feb. 21, 1997). Magana-Pizano filed a timely petition for review of the BIA's decision with this Court.

Magana-Pizano also filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the District of Arizona. In his habeas petition, he argued that the BIA's decision and interpretation of AEDPA section 440(d) violated the Equal Protection Clause of the Constitution. The district court dismissed the complaint without prejudice for lack of jurisdiction, explaining that the statutory basis for habeas review for aliens in custody pursuant to an order of deportation was repealed by a different section of AEDPA. *See* AEDPA § 401(e), repealing 8 U.S.C. § 1105a(a)(10). Magana-Pizano filed a timely appeal of that decision to this Court. We sua sponte consolidated both matters.

II

We first address Magana-Pizano's petition for review of the BIA decision holding that he was ineligible for discretionary relief under INA § 212(c). Magana-Pizano challenges the BIA's interpretation of AEDPA section 440(d) and its applicability to his case. We cannot reach the merits, however, because of new limitations that Congress has placed on our ability to hear such claims.

Prior to passage of IIRIRA, Pub.L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), as amended by Act of Oct. 11, 1996, Pub.L. No. 104-302, 110 Stat. 3656, the United States Court of Appeals was the proper tribunal for parties who wished judicial review of a BIA decision. *See* INA § 106(a), 8 U.S.C. § 1105a (1994) (repealed 1996). That now-repealed INA section provided that an alien could obtain judicial review by the appropriate court of appeals after entry of a final order of deportation.

Immigration proceedings initiated by the INS before IIRIRA's general effective date of April 1, 1997, in which a final deportation or exclusion order was filed after October 30, 1996, are governed by interim transitional rules. *See* IIRIRA § 309(c); *Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997).[3] Because the BIA's decision holding Magana-Pizano statutorily ineligible for relief was issued March 17, 1997, IIRIRA's transi-

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[3] The scope and validity of the permanent changes made by IIRIRA are not before us and we therefore decline to address those issues.

tional provisions apply to his case. *See* IIRIRA § 309(c)(4); *Kalaw*, 133 F.3d at 1150.[4]

Section 309(c)(4)(G) provides:

> there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

The INS concedes that this Court nonetheless retains a limited scope of judicial review for aliens who are deportable for criminal offenses enumerated in section 309(c)(4)(G) of IIRIRA—"[to] determine for itself whether the petitioner is (i) an alien (ii) deportable (iii) by reason of a criminal offense listed in the statute."

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[4] IIRIRA's jurisdictional changes are still subject to the judicial presumption against retroactive application of new legislation to pending cases. *See Hughes Aircraft Co. v. U.S. ex rel Schumer*, 520 U.S. 939, 117 S. Ct. 1871, 1878, 138 L.Ed.2d 135 (1997) ("[t]he fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity, not an exception to the rule itself."); *LaFontant v. INS*, 135 F.3d 158, 163 (D.C. Cir.1998) ("the Supreme Court has clearly established the principle that in determining retroactivity, jurisdictional statutes are to [be] evaluated in the same manner as any other statute.")

Yang v. INS, 109 F.3d 1185, 1192 (7th Cir. 1997), *cert. denied*, — U.S. ——, 118 S. Ct. 624, 139 L.Ed.2d 605 (1997). Magana-Pizano does not dispute that he is an alien deportable by reason of having committed one of the enumerated crimes. Rather, he argues that the Immigration Judge's and BIA's reading of AEDPA § 440(d) constitute an impermissible retroactive application of the amended statute.

Congress evidenced a specific intent for IIRIRA to apply retroactively to pending cases simply by virtue of its creation of transitional rules. *See* IIRIRA § 309(c). To this end, we note that this Court had jurisdiction to review certain final orders of deportation "only because Congress had conferred it." *Duldulao v. INS*, 90 F.3d 396, 399-400 (9th Cir. 1996); *see also Carlson v. Landon*, 342 U.S. 524, 537, 72 S. Ct. 525, 96 L.Ed. 547 (1952) ("The power to expel aliens, being essentially a power of the political branches of government, the legislative and the executive, may be exercised entirely through executive officers, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.") (internal quotation marks and footnote omitted)). Because Magana-Pizano's arguments are not within the narrow scope of this Court's review on direct appeal under IIRIRA's transitional rules, we dismiss his petition for review for lack of jurisdiction.

III

A

The district court denied Magana-Pizano's habeas corpus petition after concluding that the statutory basis

for habeas review for aliens in custody pursuant to an order of deportation had been repealed by AEDPA. We agree that one avenue has been eliminated, but hold that the district court retains jurisdiction under 28 U.S.C. § 2241 when the petitioner has no other judicial remedy. Thus, we reverse the judgment of the district court.

Prior to the passage of AEDPA and IIRIRA, aliens wishing to challenge the constitutionality of a final order of deportation via habeas corpus did so using one of two general methods: (1) proceeding pursuant to INA § 106(a)(10); or (2) proceeding pursuant to the general statutory habeas provision of 28 U.S.C. § 2241.[5] Prior to its repeal by AEDPA, INA § 106(a) provided the primary means of habeas review because its scope was broader than 28 U.S.C. § 2241.[6] Magana-Pizano filed his habeas petition pursuant to 28 U.S.C. § 2241.

We had previously expressly declined to decide the scope of habeas remaining after passage of AEDPA. *See Duldulao*, 90 F.3d at 400 n. 4. However, we recently decided that the remedy of habeas corpus was

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[5] 28 U.S.C. § 2241 provides that writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. Among other things, it affords a remedy through a writ of habeas corpus to persons in custody in violation of the Constitution or laws or treaties of the United States.

[6] Enactment of the INA § 106(a)(10) habeas remedy did not supplant the district court's general habeas corpus jurisdiction under 28 U.S.C. § 2241. Section 106 was enacted in 1961, after which we held that district courts had jurisdiction under *both* INA § 106(a)(10) and 28 U.S.C. § 2241 to review a final order of deportation, including the denial of discretionary relief pursuant to INA § 212(c). *Sotelo Mondragon v. Ilchert*, 653 F.2d 1254, 1255 (9th Cir. 1980).

not available in immigration cases when a right of direct review existed. *See Hose v. INS*, 141 F.3d 932, 935 (9th Cir. 1998). In *Hose*, the petitioner ignored her undisputed right to judicial review via a petition for review filed in this Court and instead filed a habeas petition under § 2241.

Hose considered the petitioner's claims in light of newly enacted INA § 242(g), which provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

INA § 242(g) (codified at 8 U.S.C. § 1252(g) (Supp. II 1996)).

In view of INA § 242(g), the court affirmed dismissal of the petition for lack of jurisdiction, stating:

> Except as provided in section 1252, federal courts are divested of all jurisdiction to hear any claim by any alien involving an immigration proceeding. This means that no federal court has jurisdiction to consider any such matter. Section 1252 gives this court jurisdiction to hear those claims by way of a petition for review of a final order of removal. 8 U.S.C. § 1252(b). Section 1252 does not give the district court jurisdiction to hear Hose's habeas petition. Not having been granted jurisdiction under section 1252, that jurisdiction is removed just as the statute says it is.

Hose, 141 F.3d at 935 (emphasis in original).

The court further explained in considering *Hose's* habeas petition that:

> Under IIRIRA, Congress has not attempted to preclude all federal court review of orders to exclude or remove aliens. Rather it has provided a streamlined approach for consideration by the courts of appeals of claims arising from those orders and the procedures leading to them.

Id. at 936.

Thus, *Hose* was decided in the context of an appeal of a discretionary administrative decision for which alternative judicial remedies existed. Magana-Pizano's habeas corpus petition arises under polar opposite conditions: he has raised colorable constitutional issues concerning his proposed deportation, but has no judicial remedy save habeas relief because he is subject to the transitional rules of IIRIRA and the judicial review provisions found at new INA § 242(a) and (b) are not available to him. In short, if we apply INA § 242(g) as construed by *Hose*[7] to Magana-Pizano, he has no means of judicial review. Thus, Magana-Pizano's petition presents the question of whether INA § 242(g), as inter-

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[7] We employ the phrase "as construed by *Hose*" because other circuits have construed IIRIRA differently, *see Goncalves v. Reno*, 144 F.3d 110, 117 (1st Cir. 1998); *Jean-Baptiste v. Reno*, 144 F.3d 212, 218- 219 (2d Cir. 1998), and the Supreme Court has not as yet resolved the inter-circuit conflict. However, these considerations are irrelevant to our consideration because *Hose*'s construction is binding in this Circuit. *See Jeffries v. Wood*, 114 F.3d 1484, 1492 (9th Cir. 1997) ("Only an en banc panel may overturn existing Ninth Circuit precedent.")

preted by *Hose* and applied to cases such as the one before us, violates the Suspension Clause of the United States Constitution by denying habeas relief in cases where no other avenue of judicial review exists.

This was a question expressly reserved by *Hose*. In *Hose*, the court found no Suspension Clause violation because "Hose fail[ed] to establish how direct review of her claims by this court would be inadequate or ineffective." *Hose*, 141 F.3d at 936. However, the panel specifically noted that: "[w]e express no opinion on whether the statute violates the Suspension Clause as to aliens who then have no avenue of judicial review." *Id.* n. 3. (emphasis in original). *See Swain v. Pressley*, 430 U.S. 372, 381, 97 S. Ct. 1224, 51 L.Ed.2d 411 (1977) (finding no unconstitutional suspension of the Great Writ when a substitute procedure is available "which is neither inadequate nor ineffective to test the legality of a person's detention.").

The Suspension Clause provides that: "The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art I, § 9, cl. 2. Although we assess the writ which the Constitution protects against suspension "as it exists today, rather than as it existed in 1789," see *Felker v. Turpin*, 518 U.S. 651, 664, 116 S. Ct. 2333, 135 L.Ed.2d 827 (1996), historical perspective is important.

As Chief Justice Burger noted, the "traditional Great Writ was largely a remedy against executive detention." *Swain*, 430 U.S. at 386, 97 S.Ct. 1224 (Burger, C.J., concurring). Indeed, challenges to executive detention are at the "historical core of the Suspension

Clause." *Goncalves v. Reno*, 144 F.3d 110, 123 (1st Cir. 1998). The "most celebrated writ in the English law," according to Blackstone, was employed to test "all manner of illegal confinement." 3 William Blackstone, Commentaries *129, *131. The writ was used in England to test the validity of noncriminal custody "since at least the early seventeenth century." Jonathan L. Hafetz, Note, The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts, 107 Yale L.J. 2509, 2523 (1998). It eventually became a tool to challenge detention by the King. In *Darnel's Case*, 3 Howell's State Trials 1 (K.B.1627) (also known as *Case of Five Knights*), the writ was issued to test King Charles I's imprisonment of Sir Thomas Darnel and others for refusing to submit to the King's forced loan. Although the writ was ultimately denied, parliament responded by forcing King Charles to affirm the Petition of Right which abolished the King's power to imprison by special command without showing cause. William F. Duker, A Constitutional History of Habeas Corpus 43-44 (1980). Thus, even in the Seventeenth Century, judicial scrutiny of executive detention existed long before the right was ever articulated in a governing instrument such as the Constitution.

The English tradition of challenging executive detention by habeas corpus continued into American immigration jurisprudence. Aside from the Alien and Sedition Acts passed in 1798, Congress did not enact legislation restricting immigration until Page Law of 1875, 18 Stat 477, which proscribed the entry of prostitutes and "oriental" laborers brought into the United States involuntarily. Shortly thereafter, in May, 1882, Congress passed the Chinese Exclusion Act, 22 Stat 58, which forbade the immigration of Chinese laborers for

ten years. Numerous Chinese successfully challenged the application of the Exclusion Act through a habeas writ because they were citizens or residents of this country or otherwise outside of the Exclusion Act's jurisdictional reach. *See, e.g., In re Ah Sing*, 13 F. 286 (9th Cir. 1882); *In re Ah Tie*, 13 F. 291 (9th Cir. 1882); *In re Low Yam Chow*, 13 F. 605 (9th Cir. 1882). The volume of habeas petitions was substantial: from 1882 to 1890, Judge Ogden Hoffman of the Northern District of California heard an estimated 7,000 Chinese habeas corpus petitions alone. David C. Frederick, Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891-1941 59 (1994).

In 1885, the notion that the remedy of habeas corpus was not available because immigration was solely within the executive prerogative was soundly rejected in *In re Jung Ah Lung*, 25 F. 141, 142-43 (D. Cal. 1885), a decision affirmed by both the Ninth Circuit and the Supreme Court. *See United States v. Jung Ah Lung*, 124 U.S. 621, 8 S. Ct. 663, 31 L.Ed. 591 (1888). In that case, after noting that the writ "has always been considered among English-speaking peoples the most sacred muniment of personal freedom," the court observed:

> The right to a writ of *habeas corpus* is the right to have the lawfulness of the restraint to which the petitioner is subjected inquired into by the courts; to be adjudged and determined by the law of the land. It has not as yet been committed to any purely executive officer. I am, therefore, clearly of the opinion that it is the duty of the "court justice or judge to whom such application (for a writ of *habeas*

> *corpus*) is made, to forthwith award writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto." Rev St. § 755. The performance of this duty the court is not at liberty, on any pretext, to evade. That on the return of the writ it is the duty of the court to inquire and determine whether the restraint is lawful, independently of any previous decision of the question by the collector or his deputy, or by the surveyor, or by the inspector of customs stationed on board the vessel.

Id. at 143-44 (italics and parenthetical reference in original). The Supreme Court affirmed, holding that the petitioner met the prerequisites for filing a writ, and that nothing in the Chinese Exclusion Act removed the writ. *Jung Ah Lung*, 124 U.S. at 626-32, 8 S. Ct. 663 ("We see nothing in these acts which in any manner affects the jurisdiction of the courts of the United States to issue a writ of habeas corpus.") A subsequent attempt to limit the jurisdictional implications of the decision was rejected in *United States v. Chung Shee*, 76 F. 951, 955-56 (9th Cir. 1896).

Subsequent to 1882, Congress passed a number of immigration laws which provided increased restrictions on judicial review, including the Immigration Act of 1891, 26 Stat. 1084, the Immigration Act of 1907, 34 Stat 898, and the Immigration Act of 1917, 39 Stat. 897. The Supreme Court sustained the restrictions on judicial review of discretionary decisions, in the process drawing for the first time the distinction between aliens seeking admission to the United States and aliens already legally present and wishing to stay. *See, e.g., Ekiu v. United States*, 142 U.S. 651, 12 S. Ct. 336, 35

L.Ed. 1146 (1892) (holding that Congress' plenary power to regulate immigration supplanted any procedural due process rights of arriving aliens subject to exclusion proceedings); *United States v. Ju Toy*, 198 U.S. 253, 25 S. Ct. 644, 49 L.Ed. 1040 (1905) (assuming arguendo that an alien seeking admission has Fifth Amendment due process rights, those rights do not require a judicial trial as to the grounds for denial of entrance). However, throughout this period, the courts entertained challenges to executive immigration decisions through the remedy of habeas corpus. *See U.S. v. Chin Len*, 187 F. 544, 549 (2d Cir. 1911) (an alien denied entry despite his valid claim of citizenship may properly challenge the fairness of his hearing by means of habeas corpus); *U.S. v. Tsuji*, 199 F. 750 (9th Cir. 1912) (habeas corpus affords a remedy against the action of immigration officers, where they exceed their power or authority, although their decisions on questions of fact are final and not reviewable.).

In considering the Immigration Act of 1917, the Supreme Court wrote that the Act "clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution." *Heikkila v. Barber*, 345 U.S. 229, 234-35, 73 S. Ct. 603, 97 L.Ed. 972 (1953). After concluding an alien's rights were not enlarged by enactment of the Administrative Procedure Act, the court acknowledged the role of habeas corpus relief, noting that: "Now, as before, he may attack a deportation order only by habeas corpus." *Id.* at 235, 73 S. Ct. 603. Thus, even under legislation which intended to restrict all judicial

review except as constitutionally required, the remedy of habeas corpus remained.[8]

From 1953 to 1961, habeas corpus remained the primary remedy in immigration cases. With enactment of amendments to the INA in 1961, Congress established a base grant of judicial review through petitions for review of final deportation orders, and established a new specific habeas remedy in INA § 106(a)(10). Following passage of various interim measures, including the Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359, AEDPA and IIRIRA present the next major development in the evolution of judicial review of immigration decisions, including the repeal of INA § 106.[9]

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[8] Some courts have suggested that *Heikkila's* habeas umbrella covers only narrow specific due process claims. This reading ignores cases decided subsequent to *Heikkila* in which Supreme Court reviewed both statutory and other constitutional claims. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268, 74 S. Ct. 499, 98 L.Ed. 681 (1954) (due process includes the right to have the decision-maker abide by applicable regulations); *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 77-79, 77 S. Ct. 618, 1 L.Ed.2d 652 (1957) (reviewing the Board of Immigration Appeals' discretionary denial of an application for suspension of deportation for an abuse of discretion). Moreover, the reference to due process in *Heikkila* related to the scope of review on habeas of an agency's factual determinations, not the entire range of permissible claims not presented by the facts of that case. *See Heikkila*, 345 U.S. at 236, 73 S. Ct. 603.

[9] Despite the repeated mantra that Congress' power over immigration is plenary, an exception has been consistently recognized for those lawful aliens already present in the country and subject to deportation rather than exclusion. The Supreme Court explained that these aliens have procedural due process rights of a more traditional nature because "once an alien gains admission to our country and begins to develop the ties that go with permanent

Hose interpreted IIRIRA as eliminating all forms of judicial review in immigration cases, including the remedy of habeas corpus. *Hose*, 141 F.3d at 935 ("No federal court has jurisdiction to consider any such matter."). Although we are mindful of our obligation to interpret the statute in a manner that renders it constitutionally valid, *see U.S. v. Henson*, 123 F.3d 1226, 1232 (9th Cir. 1997), *Hose's* statutory construction is binding upon us, even if we were inclined to interpret IIRIRA in a way that passes constitutional muster. *See United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1292 (9th Cir. 1992), *rev'd on other grounds*, 513 U.S. 64, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994).

Thus, we must squarely face the issue of whether INA § 242(g) as construed by *Hose* and applied to the case at hand violates the Suspension Clause. Given the history of the writ, both in England and as applied in

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residence, his constitutional status changes accordingly." *Landon v. Plasencia*, 459 U.S. 21, 32, 103 S. Ct. 321, 74 L.Ed.2d 21 (1982). *See also Ramirez-Durazo v. INS*, 794 F.2d 491, 496 (9th Cir. 1986) ("An alien in deportation proceedings is entitled to certain procedural protections and substantive rights not available in an exclusion proceeding."). This structure has been altered by IIRIRA; all proceedings have been consolidated into a single process now known as "removal" proceedings. See INA § 239(a), 8 U.S.C. § 1229(a) (Supp. 1998). This procedural restructuring does not by itself expand or contract the constitutional protections previously recognized in our immigration jurisprudence. *See Harman v. Forssenius*, 380 U.S. 528, 540, 85 S. Ct. 1177, 14 L.Ed.2d 50 (1965) ("Constitutional rights would be of little value if they could be . . . indirectly denied."); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829, 115 S. Ct. 1842, 131 L.Ed.2d 881 (1995) ("The Constitution 'nullifies sophisticated as well as simple-minded modes' of infringing on Constitutional protections.").

immigration cases in the United States, the answer must plainly be in the affirmative. Indeed, that conclusion is compelled by *Heikkila*. If in enacting IIRIRA Congress intended to preclude judicial review in immigration cases "except insofar as it was required by the Constitution," *Id.* at 234 then *Heikkila* provides the judicial response: "[n]ow, as before," a petitioner may attack a deportation order by habeas corpus. *Id.* at 235. Simply put, elimination of all judicial review of executive detention violates the Constitution.

B

Determining that Congress may not constitutionally repeal all forms of habeas relief in immigration cases without offending the Suspension Clause does not fully resolve the question at hand. The scope of habeas relief which the Constitution protects against suspension has been long debated. *See* Lenni B. Benson, Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings, 29 Conn. L. Rev. 1411, 1474-78 (1997).

The Constitution itself "does not expressly provide a grant of jurisdiction to hear habeas petitions; rather, the Constitution preserves access to habeas corpus in the Suspension Clause." *Id.* at 1474. However, "[s]ince *Ex Parte Bollman*, it has generally been accepted that the intent of the habeas clause was somehow to guarantee a federal writ of habeas corpus." Duker, *supra* at 126. In *Bollman*, the presence of a constitutional imperative coupled with the absence of an expressly defined right was interpreted by Chief Justice Marshall as circumstance compelling congressional action. *See Ex parte Bollman*, 4 Cranch 75, 8 U.S. 75, 95, 2 L.Ed.

554 (1807) ("Acting under the immediate influence of this injunction, [Congress] must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity. . . ."). Thus, Chief Justice Marshall implied a duty upon Congress to provide for the writ, noting that, "for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted." *Id.*; *see also Stewart v. Martinez-Villareal*, — U.S. ——, 118 S. Ct. 1618, 1622, 140 L.Ed.2d 849 (1998) ("It is axiomatic that 'the power to award the writ of habeas corpus by any of the courts of the United States, must be given by written law.'") (Scalia, J., dissenting).

If Congress had expressly chosen to repeal all statutory habeas, then we would be faced with the thorny problem of defining the contours of the "free standing" constitutional writ. *See Kolster v. INS*, 101 F.3d 785, 790 n. 1 (1st Cir. 1996). Fortunately, we are not confronted with that circumstance. Neither AEDPA nor IIRIRA expressly refer to statutory habeas corpus relief pursuant to 28 U.S.C. § 2241. Thus, this is not an instance of express statutory repeal. *Moyle v. Director, OWCP*, 147 F.3d 1116, n.4 (9th Cir. 1998). The base habeas statute, 28 U.S.C. § 2241, which is the modern descendant of legislation passed by the First Congress of the United States, 1 U.S. Statutes at large 73, 81-82, remains. *Hose's* construction of IIRIRA forfended access to relief under 28 U.S.C. § 2241 in immigration cases alone. Because the Suspension Clause forbids that application in this case, IIRIRA's impediment to the general habeas remedies of 28 U.S.C. § 2241 is removed for Magana-Pizano and those similarly situ

ated. Thus, because Congress has chosen to implement the general right of habeas relief through 28 U.S.C. § 2241, we conclude that to the extent habeas remedies in immigration cases are protected by the Suspension Clause, relief is afforded through the statutory remedy of 28 U.S.C. § 2241.

This result is consistent with the historical treatment of habeas corpus in immigration cases. At the time when judicial review was congressionally limited "except insofar as it was required by the Constitution," *Heikkila*, 345 U.S. at 234, 73 S. Ct. 603, habeas relief was granted under the general habeas statute, not a common law writ. *See United States ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, 98 L.Ed. 681 (1954).

Our conclusion is also consistent with the requirement that judicial review of constitutional claims not be foreclosed. *See Webster* v. *Doe*, 486 U.S. 592, 603, 108 S. Ct. 2047, 100 L.Ed.2d 632 (1988) ("serious constitutional question [s] . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."). The BIA lacks jurisdiction to adjudicate constitutional issues. *See Wang v. Reno*, 81 F.3d 808, 814 n. 7 (9th Cir. 1996); *Bagues-Valles v. INS*, 779 F.2d 483, 484 (9th Cir. 1985). Accordingly, under *Hose's* construction, INA § 242(g) would prevent Magana-Pizano from presenting his constitutional claims before any tribunal, administrative or judicial, far short of providing a procedure "which is neither inadequate nor ineffective to test the legality of a person's detention." *Swain*, 430 U.S. at 381, 97 S.Ct. 1224.

Because section 2241 habeas relief is limited to persons in custody in violation of the Constitution or laws or treaties of the United States, it is, as we have noted, more narrow than habeas relief previously available under INA § 106. However, Magana-Pizano's petition clearly states a claim under 28 U.S.C. § 2241. He has made a colorable argument that his deportation would violate the Equal Protection and Due Process Clauses, and that his deportation is forbidden by United States statute. Thus, the gravamen of his action does not fall within the rubric of purely discretionary challenges, which some courts have held outside the scope of section 2241. *See*, e.g., *Yang v. INS*, 109 F.3d 1185, 1195 (7th Cir. 1997).

The INS contends that if habeas corpus review remains under 28 U.S.C. § 2241, it must be limited to situations in which there is a threat of a "fundamental miscarriage of justice." No such limitation appears in 28 U.S.C. § 2241, and we decline to assume a legislative role and insert additional statutory language. Section 2241 has a long and storied history, and its standards are well-developed and known. The "fundamental miscarriage of justice" requirements have been imposed judicially only in cases of successive petitions where the abuse of the writ doctrine would otherwise bar a subsequent petition. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 404, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993) and *Sawyer v. Whitley*, 505 U.S. 333, 339, 112 S. Ct. 2514, 120 L.Ed.2d 269 (1992). Neither Congress nor the courts have imposed a "fundamental miscarriage of justice" requirement in a first habeas petition, and there is no statutory or judicial basis for doing so here. Thus, if a first-time habeas corpus petitioner is "in custody in violation of the Constitution or laws or

treaties of the United States," the petitioner is entitled to habeas corpus relief. 28 U.S.C. § 2241(c)(3).

Accordingly, because the Suspension Clause prevents IIRIRA from foreclosing access to general statutory habeas relief in this case, Magana-Pizano may pursue his remedies under 28 U.S.C. § 2241.

IV

The INS argues that to the extent the federal courts have any jurisdiction over Magana-Pizano's habeas petition, such jurisdiction lies with the Court of Appeals. However, the plain language of 28 U.S.C. § 2241 provides an unambiguous grant of jurisdiction to the district courts, stating, "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a) (1994). We are aware of the general concerns surrounding a bifurcated system of review. However, bifurcated review of immigration matters has been the norm, not the exception. *Compare Foti v. INS*, 375 U.S. 217, 221, 84 S. Ct. 306, 11 L.Ed.2d 281 (1963) (Court of Appeals review of discretionary relief) and *Giova v. Rosenberg*, 379 U.S. 18, 85 S. Ct. 156, 13 L.Ed.2d 90 (1964) (Court of Appeals review of motion to reopen), with *Cheng Fan Kwok v. INS*, 392 U.S. 206, 216, 88 S. Ct. 1970, 20 L.Ed.2d 1037 (1968) (district court review of denial of stay of deportation). Moreover, it is appropriate that any evidentiary hearings with respect to habeas matters take place at the district court level which is uniquely positioned to handle such issues and develop the appropriate record. *American-Arab Anti-Discrimination Committee v. Reno*, 119 F.3d 1367, 1373

(9th Cir. 1997), *cert. granted*, — U.S. ——, 118 S. Ct. 2059, 141 L.Ed.2d 137 (1998). Magana-Pizano's petition raises factual questions which are best committed to the wisdom of the district court for resolution.

Regardless of these policy considerations, in the end the choice of jurisdictional assignment is a Congressional one, and Congress vested the district courts with the power to review habeas corpus petitions. It is not only a proper choice, but one which we lack the power to judicially divest.

V

In summary, we deny Magana-Pizano's petition for review for lack of jurisdiction. We reverse the district court's dismissal of Magana-Pizano's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 for lack of jurisdiction, and remand the case to the district court with instructions to proceed to the merits of the petition. We award Magana-Pizano his costs on appeal, but the question of attorney fees is reserved until the district court decides the merits of the petition.

PETITION FOR REVIEW DISMISSED; JUDGMENT REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 97-15678, 97-70384

DANIEL MAGANA-PIZANO, PETITIONER-APPELLANT

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE

Argued and Submitted Aug. 12, 1997
Decided Sept. 1, 1998

Appeal from the United States District Court for the District of Arizona; Stephen M. McNamee, District Judge, Presiding. D.C. No. CV 97-00619 SMM.

Before: GOODWIN and THOMAS, Circuit Judges, PREGERSON,* District Judge.

PER CURIAM.

With enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act

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* The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

of 1996 ("IIRIRA"), Congress dramatically altered our immigration laws and judicial remedies for immigrants facing deportation or exclusion. To consider the proper jurisdiction for habeas corpus petitions and petitions for review of Board of Immigration Appeals decisions under the new statutes, we consolidated these actions. We dismiss the petition for review for lack of jurisdiction, but hold that the petitioner may pursue habeas corpus relief under 28 U.S.C. § 2241 in the United States District Court.

I

Daniel Magana-Pizano is a 25-year old native and citizen of Mexico who entered the United States on December 28, 1977, as the five-year old child of a lawful permanent resident. Magana-Pizano's parents and three of his siblings are lawful permanent residents of the United States; his fourth sibling is a United States citizen. Since his admission into the United States, Magana-Pizano has resided in Southern California and Arizona. He attended high school in the United States, and most recently worked as a fork lift operator.

His past includes a criminal history, albeit for mostly minor offenses. Relevant to this appeal, he was convicted in February 1995 in a California state court of being under the influence of cocaine and methamphetamine in violation of section 11550(a) of the California Health and Safety Code, a misdemeanor offense.

On May 17, 1996, the Immigration and Naturalization Service ("INS") issued an Order to Show Cause[1] to

[1] The Order to Show Cause alleged that Magana-Pizano was deportable under INA § 241(a)(2)(B)(i), codified at 8 U.S.C. § 1251

Magana-Pizano alleging that he was deportable as a result of this misdemeanor criminal conviction. At his deportation hearing, Magana-Pizano conceded his deportability as a result of the drug conviction, but indicated that he would apply for a discretionary waiver of deportation under Section 212(c) of the Immigration and Nationality Act ("INA").

Unbeknownst to Magana-Pizano, Congress had already passed AEDPA, Pub.L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 22, 28, 40, 42, 50 U.S.C.). Section 440(d) of AEDPA amended INA § 212(c) to eliminate discretionary relief for aliens convicted of most drug-related crimes, including Magana-Pizano's.[2] As a result of this

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(1994) (redesignated by IIRIRA § 305(a)(2) as INA § 237(a)(2)(i), to be codified at 8 U.S.C. § 1227(a)(2)(B)(i) (Supp. II 1996)). This section provides that "[a]ny alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is deportable."

[2] Section 440(d) of AEDPA modifies 8 U.S.C. § 1182(c) to provide that the Attorney General no longer has the authority to waive deportation of aliens convicted of certain crimes, such as those involving controlled substances. It provides:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(c)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of

statutory change, the INS filed a motion to pretermit Magana-Pizano's application for relief under INA § 212(c), arguing that section 440(d) of AEDPA and its amendment to section 212(c) were effective as of the date of passage on April 24, 1996. These changes provided that any alien who, like Magana-Pizano, was deportable due to a criminal conviction under 8 U.S.C. § 1251(a)(2)(B), was statutorily ineligible for discretionary relief.

The Immigration Judge granted the INS motion to pretermit Magana-Pizano's application and ordered Magana-Pizano deported to Mexico. Magana-Pizano appealed this decision to the Board of Immigration Appeals ("BIA"), which sustained the deportation order based on AEDPA changes to INA § 212(c), and the Attorney General's opinion in *Matter of Soriano*, Int. Dec. 3289 (A.G. Feb. 21, 1997). Magana-Pizano filed a timely petition for review of the BIA's decision with this Court.

Magana-Pizano also filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the District of Arizona. In his habeas petition, he argued that the BIA's decision and interpretation of AEDPA section 440(d) violated the Equal Protection Clause of the Constitution. The district court dismissed the complaint

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having committed any criminal offense covered in section 1251(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1251(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 1251(a)(2)(A)(i) of this title.

without prejudice for lack of jurisdiction, explaining that the statutory basis for habeas review for aliens in custody pursuant to an order of deportation was repealed by a different section of AEDPA. *See* AEDPA § 401(e), repealing 8 U.S.C. § 1105a(a)(10). Magana-Pizano filed a timely appeal of that decision to this Court. We sua sponte consolidated both matters.

II

We first address Magana-Pizano's petition for review of the BIA decision holding that he was ineligible for discretionary relief under INA § 212(c). Magana-Pizano challenges the BIA's interpretation of AEDPA section 440(d) and its applicability to his case. We cannot reach the merits, however, because of new limitations that Congress has placed on our ability to hear such claims.

Prior to passage of IIRIRA, Pub.L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), as amended by Act of Oct. 11, 1996, Pub.L. No. 104-302, 110 Stat. 3656, the United States Court of Appeals was the proper tribunal for parties who wished judicial review of a BIA decision. *See* INA § 106(a), 8 U.S.C. § 1105a (1994) (repealed 1996). That now-repealed INA section provided that an alien could obtain judicial review by the appropriate court of appeals after entry of a final order of deportation.

Petitions for review filed between the passage of IIRIRA on September 30, 1996, and IIRIRA's general effective date of April 1, 1997, are governed by interim transitional rules. *See* IIRIRA § 309(c); *Kalaw v. INS*,

133 F.3d 1147, 1150 (9th Cir. 1997).[3] Because the BIA's decision holding Magana-Pizano statutorily ineligible for relief was issued March 17, 1997, IIRIRA's transitional provisions apply to his case. *See* IIRIRA § 309(c)(4); *Kalaw*, 133 F.3d at 1150.[4]

Section 309(c)(4)(G) provides:

> there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

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[3] The scope and validity of the permanent changes made by IIRIRA are not before us and we therefore decline to address those issues.

[4] IIRIRA's jurisdictional changes are still subject to the judicial presumption against retroactive application of new legislation to pending cases. *See Hughes Aircraft Co. v. U.S. ex rel Schumer*, 520 U.S. 939, 117 S. Ct. 1871, 1878, 138 L.Ed.2d 135 (1997) ("[t]he fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity, not an exception to the rule itself."); *LaFontant v. INS*, 135 F.3d 158, 163 (D.C. Cir.1998) ("the Supreme Court has clearly established the principle that in determining retroactivity, jurisdictional statutes are to [be] evaluated in the same manner as any other statute.")

The INS concedes that this Court nonetheless retains a limited scope of judicial review for aliens who are deportable for criminal offenses enumerated in section 309(c)(4)(G) of IIRIRA—"[to] determine for itself whether the petitioner is (i) an alien (ii) deportable (iii) by reason of a criminal offense listed in the statute." *Yang v. INS*, 109 F.3d 1185, 1192 (7th Cir. 1997), *cert. denied*, — U.S. ——, 118 S. Ct. 624, 139 L.Ed.2d 605 (1997). Magana-Pizano does not dispute that he is an alien deportable by reason of having committed one of the enumerated crimes. Rather, he argues that the Immigration Judge's and BIA's reading of AEDPA § 440(d) constitute an impermissible retroactive application of the amended statute.

Congress evidenced a specific intent for IIRIRA to apply retroactively to pending cases simply by virtue of its creation of transitional rules. *See* IIRIRA § 309(c). To this end, we note that this Court had jurisdiction to review certain final orders of deportation "only because Congress had conferred it." *Duldulao v. INS*, 90 F.3d 396, 399-400 (9th Cir. 1996); *see also Carlson v. Landon*, 342 U.S. 524, 537, 72 S. Ct. 525, 96 L.Ed. 547 (1952) ("The power to expel aliens, being essentially a power of the political branches of government, the legislative and the executive, may be exercised entirely through executive officers, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.") (internal quotation marks and footnote omitted)). Because Magana-Pizano's arguments are not within the narrow scope of this Court's review on direct appeal under IIRIRA's transitional rules, we dismiss his petition for review for lack of jurisdiction.

III

A

The district court denied Magana-Pizano's habeas corpus petition after concluding that the statutory basis for habeas review for aliens in custody pursuant to an order of deportation had been repealed by AEDPA. We agree that one avenue has been eliminated, but hold that the district court retains jurisdiction under 28 U.S.C. § 2241 when the petitioner has no other judicial remedy. Thus, we reverse the judgment of the district court.

Prior to the passage of AEDPA and IIRIRA, aliens wishing to challenge the constitutionality of a final order of deportation via habeas corpus did so using one of two general methods: (1) proceeding pursuant to INA § 106(a)(10); or (2) proceeding pursuant to the general statutory habeas provision of 28 U.S.C. § 2241.[5] Prior to its repeal by AEDPA, INA § 106(a) provided the primary means of habeas review because its scope was broader than 28 U.S.C. § 2241.[6] Magana-Pizano filed his habeas petition pursuant to 28 U.S.C. § 2241.

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[5] 28 U.S.C. § 2241 provides that writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. Among other things, it affords a remedy through a writ of habeas corpus to persons in custody in violation of the Constitution or laws or treaties of the United States.

[6] Enactment of the INA § 106(a)(10) habeas remedy did not supplant the district court's general habeas corpus jurisdiction under 28 U.S.C. § 2241. Section 106 was enacted in 1961, after which we held that district courts had jurisdiction under *both* INA § 106(a)(10) and 28 U.S.C. § 2241 to review a final order of deportation, including the denial of discretionary relief pursuant to INA

We had previously expressly declined to decide the scope of habeas remaining after passage of AEDPA. *See Duldulao*, 90 F.3d at 400 n. 4. However, we recently decided that the remedy of habeas corpus was not available in immigration cases when a right of direct review existed. *See Hose v. INS*, 141 F.3d 932, 935 (9th Cir. 1998). In *Hose*, the petitioner ignored her undisputed right to judicial review via a petition for review filed in this Court and instead filed a habeas petition under § 2241.

Hose considered the petitioner's claims in light of newly enacted INA § 242(g), which provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

INA § 242(g) (codified at 8 U.S.C. § 1252(g) (Supp. II 1996)).

In view of INA § 242(g), the court affirmed dismissal of the petition for lack of jurisdiction, stating:

> Except as provided in section 1252, federal courts are divested of all jurisdiction to hear any claim by any alien involving an immigration proceeding. This means that no federal court has jurisdiction to consider any such matter. Section 1252 gives this court jurisdiction to hear those claims by way of a petition

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§ 212(c). *Sotelo Mondragon v. Ilchert*, 653 F.2d 1254, 1255 (9th Cir. 1980).

> for review of a final order of removal. 8 U.S.C. § 1252(b). Section 1252 does not give the district court jurisdiction to hear Hose's habeas petition. Not having been granted jurisdiction under section 1252, that jurisdiction is removed just as the statute says it is.

Hose, 141 F.3d at 935 (emphasis in original).

The court further explained in considering *Hose's* habeas petition that:

> Under IIRIRA, Congress has not attempted to preclude all federal court review of orders to exclude or remove aliens. Rather it has provided a streamlined approach for consideration by the courts of appeals of claims arising from those orders and the procedures leading to them.

Id. at 936.

Thus, *Hose* was decided in the context of an appeal of a discretionary administrative decision for which alternative judicial remedies existed. Magana-Pizano's habeas corpus petition arises under polar opposite conditions: he has raised colorable constitutional issues concerning his proposed deportation, but has no judicial remedy save habeas relief because he is subject to the transitional rules of IIRIRA and the judicial review provisions found at new INA § 242(a) and (b) are not available to him. In short, if we apply INA § 242(g) as construed by *Hose*[7] to Magana-Pizano, he has no means

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[7] We employ the phrase "as construed by *Hose*" because other circuits have construed IIRIRA differently, *see Goncalves v. Reno*, 144 F.3d 110, 117 (1st Cir. 1998); *Jean-Baptiste v. Reno*, 144 F.3d 212, 218- 219 (2d Cir. 1998), and the Supreme Court has not as yet

of judicial review. Thus, Magana-Pizano's petition presents the question of whether INA § 242(g), as interpreted by *Hose* and applied to cases such as the one before us, violates the Suspension Clause of the United States Constitution by denying habeas relief in cases where no other avenue of judicial review exists.

This was a question expressly reserved by *Hose*. In *Hose*, the court found no Suspension Clause violation because "Hose fail[ed] to establish how direct review of her claims by this court would be inadequate or ineffective." *Hose*, 141 F.3d at 936. However, the panel specifically noted that: "[w]e express no opinion on whether the statute violates the Suspension Clause as to aliens who then have no avenue of judicial review." *Id.* n. 3. (emphasis in original). *See Swain v. Pressley*, 430 U.S. 372, 381, 97 S. Ct. 1224, 51 L.Ed.2d 411 (1977) (finding no unconstitutional suspension of the Great Writ when a substitute procedure is available "which is neither inadequate nor ineffective to test the legality of a person's detention.").

The Suspension Clause provides that: "The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art I, § 9, cl. 2. Although we assess the writ which the Constitution protects against suspension "as it exists today, rather than as it existed in 1789," see *Felker v. Turpin*, 518

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resolved the inter-circuit conflict. However, these considerations are irrelevant to our consideration because *Hose*'s construction is binding in this Circuit. *See Jeffries v. Wood*, 114 F.3d 1484, 1492 (9th Cir. 1997) ("Only an en banc panel may overturn existing Ninth Circuit precedent.")

U.S. 651, 664, 116 S. Ct. 2333, 135 L.Ed.2d 827 (1996), historical perspective is important.

As Chief Justice Burger noted, the "traditional Great Writ was largely a remedy against executive detention." *Swain*, 430 U.S. at 386, 97 S.Ct. 1224 (Burger, C.J., concurring). Indeed, challenges to executive detention are at the "historical core of the Suspension Clause." *Goncalves v. Reno*, 144 F.3d 110, 123 (1st Cir. 1998). The "most celebrated writ in the English law," according to Blackstone, was employed to test "all manner of illegal confinement." 3 William Blackstone, Commentaries *129, *131. The writ was used in England to test the validity of noncriminal custody "since at least the early seventeenth century." Jonathan L. Hafetz, Note, The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts, 107 Yale L.J. 2509, 2523 (1998). It eventually became a tool to challenge detention by the King. In *Darnel's Case*, 3 Howell's State Trials 1 (K.B.1627) (also known as *Case of Five Knights*), the writ was issued to test King Charles I's imprisonment of Sir Thomas Darnel and others for refusing to submit to the King's forced loan. Although the writ was ultimately denied, parliament responded by forcing King Charles to affirm the Petition of Right which abolished the King's power to imprison by special command without showing cause. William F. Duker, A Constitutional History of Habeas Corpus 43-44 (1980). Thus, even in the Seventeenth Century, judicial scrutiny of executive detention existed long before the right was ever articulated in a governing instrument such as the Constitution.

The English tradition of challenging executive detention by habeas corpus continued into American

immigration jurisprudence. Aside from the Alien and Sedition Acts passed in 1798, Congress did not enact legislation restricting immigration until Page Law of 1875, 18 Stat 477, which proscribed the entry of prostitutes and "oriental" laborers brought into the United States involuntarily. Shortly thereafter, in May, 1882, Congress passed the Chinese Exclusion Act, 22 Stat 58, which forbade the immigration of Chinese laborers for ten years. Numerous Chinese successfully challenged the application of the Exclusion Act through a habeas writ because they were citizens or residents of this country or otherwise outside of the Exclusion Act's jurisdictional reach. *See, e.g., In re Ah Sing*, 13 F. 286 (9th Cir. 1882); *In re Ah Tie*, 13 F. 291 (9th Cir. 1882); *In re Low Yam Chow*, 13 F. 605 (9th Cir. 1882). The volume of habeas petitions was substantial: from 1882 to 1890, Judge Ogden Hoffman of the Northern District of California heard an estimated 7,000 Chinese habeas corpus petitions alone. David C. Frederick, Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891-1941 59 (1994).

In 1885, the notion that the remedy of habeas corpus was not available because immigration was solely within the executive prerogative was soundly rejected in *In re Jung Ah Lung*, 25 F. 141, 142-43 (D. Cal. 1885), a decision affirmed by both the Ninth Circuit and the Supreme Court. *See United States v. Jung Ah Lung*, 124 U.S. 621, 8 S. Ct. 663, 31 L.Ed. 591 (1888). In that case, after noting that the writ "has always been considered among English-speaking peoples the most sacred muniment of personal freedom," the court observed:

> The right to a writ of *habeas corpus* is the right to have the lawfulness of the restraint to which the petitioner is subjected inquired into by the courts; to be adjudged and determined by the law of the land. It has not as yet been committed to any purely executive officer. I am, therefore, clearly of the opinion that it is the duty of the "court justice or judge to whom such application (for a writ of *habeas corpus*) is made, to forthwith award writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto." Rev St. § 755. The performance of this duty the court is not at liberty, on any pretext, to evade. That on the return of the writ it is the duty of the court to inquire and determine whether the restraint is lawful, independently of any previous decision of the question by the collector or his deputy, or by the surveyor, or by the inspector of customs stationed on board the vessel.

Id. at 143-44 (italics and parenthetical reference in original). The Supreme Court affirmed, holding that the petitioner met the prerequisites for filing a writ, and that nothing in the Chinese Exclusion Act removed the writ. *Jung Ah Lung*, 124 U.S. at 626-32, 8 S. Ct. 663 ("We see nothing in these acts which in any manner affects the jurisdiction of the courts of the United States to issue a writ of habeas corpus.") A subsequent attempt to limit the jurisdictional implications of the decision was rejected in *United States v. Chung Shee*, 76 F. 951, 955-56 (9th Cir. 1896).

Subsequent to 1882, Congress passed a number of immigration laws which provided increased restrictions on judicial review, including the Immigration Act of

1891, 26 Stat. 1084, the Immigration Act of 1907, 34 Stat 898, and the Immigration Act of 1917, 39 Stat. 897. The Supreme Court sustained the restrictions on judicial review of discretionary decisions, in the process drawing for the first time the distinction between aliens seeking admission to the United States and aliens already legally present and wishing to stay. *See, e.g., Ekiu v. United States*, 142 U.S. 651, 12 S. Ct. 336, 35 L.Ed. 1146 (1892) (holding that Congress' plenary power to regulate immigration supplanted any procedural due process rights of arriving aliens subject to exclusion proceedings); *United States v. Ju Toy*, 198 U.S. 253, 25 S. Ct. 644, 49 L.Ed. 1040 (1905) (assuming arguendo that an alien seeking admission has Fifth Amendment due process rights, those rights do not require a judicial trial as to the grounds for denial of entrance). However, throughout this period, the courts entertained challenges to executive immigration decisions through the remedy of habeas corpus. *See U.S. v. Chin Len*, 187 F. 544, 549 (2d Cir. 1911) (an alien denied entry despite his valid claim of citizenship may properly challenge the fairness of his hearing by means of habeas corpus); *U.S. v. Tsuji*, 199 F. 750 (9th Cir. 1912) (habeas corpus affords a remedy against the action of immigration officers, where they exceed their power or authority, although their decisions on questions of fact are final and not reviewable.).

In considering the Immigration Act of 1917, the Supreme Court wrote that the Act "clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution." *Heikkila v. Barber*, 345 U.S. 229, 234-35, 73 S. Ct. 603, 97 L.Ed. 972 (1953). After concluding an alien's rights were not enlarged by enactment of the

Administrative Procedure Act, the court acknowledged the role of habeas corpus relief, noting that: "Now, as before, he may attack a deportation order only by habeas corpus." *Id.* at 235, 73 S. Ct. 603. Thus, even under legislation which intended to restrict all judicial review except as constitutionally required, the remedy of habeas corpus remained.[8]

From 1953 to 1961, habeas corpus remained the primary remedy in immigration cases. With enactment of amendments to the INA in 1961, Congress established a base grant of judicial review through petitions for review of final deportation orders, and established a new specific habeas remedy in INA § 106(a)(10). Following passage of various interim measures, including the Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359, AEDPA and IIRIRA present the next major development in the evolution of

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[8] Some courts have suggested that *Heikkila's* habeas umbrella covers only narrow specific due process claims. This reading ignores cases decided subsequent to *Heikkila* in which Supreme Court reviewed both statutory and other constitutional claims. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268, 74 S. Ct. 499, 98 L.Ed. 681 (1954) (due process includes the right to have the decision-maker abide by applicable regulations); *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 77-79, 77 S. Ct. 618, 1 L.Ed.2d 652 (1957) (reviewing the Board of Immigration Appeals' discretionary denial of an application for suspension of deportation for an abuse of discretion). Moreover, the reference to due process in *Heikkila* related to the scope of review on habeas of an agency's factual determinations, not the entire range of permissible claims not presented by the facts of that case. *See Heikkila*, 345 U.S. at 236, 73 S. Ct. 603.

judicial review of immigration decisions, including the repeal of INA § 106.[9]

Hose interpreted IIRIRA as eliminating all forms of judicial review in immigration cases, including the remedy of habeas corpus. *Hose*, 141 F.3d at 935 ("No federal court has jurisdiction to consider any such matter."). Although we are mindful of our obligation to interpret the statute in a manner that renders it constitutionally valid, *see U.S. v. Henson*, 123 F.3d 1226, 1232 (9th Cir. 1997), *Hose's* statutory construction is binding upon us, even if we were inclined to interpret IIRIRA in a way that passes constitutional muster. *See United*

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[9] Despite the repeated mantra that Congress' power over immigration is plenary, an exception has been consistently recognized for those lawful aliens already present in the country and subject to deportation rather than exclusion. The Supreme Court explained that these aliens have procedural due process rights of a more traditional nature because "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." *Landon v. Plasencia*, 459 U.S. 21, 32, 103 S. Ct. 321, 74 L.Ed.2d 21 (1982). *See also Ramirez-Durazo v. INS*, 794 F.2d 491, 496 (9th Cir. 1986) ("An alien in deportation proceedings is entitled to certain procedural protections and substantive rights not available in an exclusion proceeding."). This structure has been altered by IIRIRA; all proceedings have been consolidated into a single process now known as "removal" proceedings. See INA § 239(a), 8 U.S.C. § 1229(a) (Supp. 1998). This procedural restructuring does not by itself expand or contract the constitutional protections previously recognized in our immigration jurisprudence. *See Harman v. Forssenius*, 380 U.S. 528, 540, 85 S. Ct. 1177, 14 L.Ed.2d 50 (1965) ("Constitutional rights would be of little value if they could be . . . indirectly denied."); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829, 115 S. Ct. 1842, 131 L.Ed.2d 881 (1995) ("The Constitution 'nullifies sophisticated as well as simple-minded modes' of infringing on Constitutional protections.").

States v. X-Citement Video, Inc., 982 F.2d 1285, 1292 (9th Cir. 1992), *rev'd on other grounds*, 513 U.S. 64, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994).

Thus, we must squarely face the issue of whether INA § 242(g) as construed by *Hose* and applied to the case at hand violates the Suspension Clause. Given the history of the writ, both in England and as applied in immigration cases in the United States, the answer must plainly be in the affirmative. Indeed, that conclusion is compelled by *Heikkila*. If in enacting IIRIRA Congress intended to preclude judicial review in immigration cases "except insofar as it was required by the Constitution," *Id.* at 234, 73 S. Ct. 603, then *Heikkila* provides the judicial response: "[n]ow, as before," a petitioner may attack a deportation order by habeas corpus. *Id.* at 235, 73 S. Ct. 603. Simply put, elimination of all judicial review of executive detention violates the Constitution.

B

Determining that Congress may not constitutionally repeal all forms of habeas relief in immigration cases without offending the Suspension Clause does not fully resolve the question at hand. The scope of habeas relief which the Constitution protects against suspension has been long debated. *See* Lenni B. Benson, Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings, 29 Conn. L. Rev. 1411, 1474-78 (1997).

The Constitution itself "does not expressly provide a grant of jurisdiction to hear habeas petitions; rather, the Constitution preserves access to habeas corpus in

the Suspension Clause." *Id.* at 1474. However, "[s]ince *Ex Parte Bollman*, it has generally been accepted that the intent of the habeas clause was somehow to guarantee a federal writ of habeas corpus." Duker, *supra* at 126. In *Bollman*, the presence of a constitutional imperative coupled with the absence of an expressly defined right was interpreted by Chief Justice Marshall as circumstance compelling congressional action. *See Ex parte Bollman*, 4 Cranch 75, 8 U.S. 75, 95, 2 L.Ed. 554 (1807) ("Acting under the immediate influence of this injunction, [Congress] must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity. . . ."). Thus, Chief Justice Marshall implied a duty upon Congress to provide for the writ, noting that, "for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted." *Id.*; *see also Stewart v. Martinez-Villareal*, — U.S. ——, 118 S. Ct. 1618, 1622, 140 L.Ed.2d 849 (1998) ("It is axiomatic that 'the power to award the writ of habeas corpus by any of the courts of the United States, must be given by written law.'") (Scalia, J., dissenting).

If Congress had expressly chosen to repeal all statutory habeas, then we would be faced with the thorny problem of defining the contours of the "free standing" constitutional writ. *See Kolster v. INS*, 101 F.3d 785, 790 n. 1 (1st Cir. 1996). Fortunately, we are not confronted with that circumstance. Neither AEDPA nor IIRIRA expressly refer to statutory habeas corpus relief pursuant to 28 U.S.C. § 2241. Thus, this is not an instance of express statutory repeal. *Moyle v. Director, OWCP*, 147 F.3d 1116, (9th Cir. 1998). The base habeas statute, 28 U.S.C. § 2241, which is the modern des-

cendant of legislation passed by the First Congress of the United States, 1 U.S. Statutes at large 73, 81-82, remains. *Hose's* construction of IIRIRA forfended access to relief under 28 U.S.C. § 2241 in immigration cases alone. Because the Suspension Clause forbids that application in this case, IIRIRA's impediment to the general habeas remedies of 28 U.S.C. § 2241 is removed for Magana-Pizano and those similarly situated. Thus, because Congress has chosen to implement the general right of habeas relief through 28 U.S.C. § 2241, we conclude that to the extent habeas remedies in immigration cases are protected by the Suspension Clause, relief is afforded through the statutory remedy of 28 U.S.C. § 2241.

This result is consistent with the historical treatment of habeas corpus in immigration cases. At the time when judicial review was congressionally limited "except insofar as it was required by the Constitution," *Heikkila*, 345 U.S. at 234, 73 S. Ct. 603, habeas relief was granted under the general habeas statute, not a common law writ. *See United States ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, 98 L.Ed. 681 (1954).

Our conclusion is also consistent with the requirement that judicial review of constitutional claims not be foreclosed. *See Webster* v. *Doe*, 486 U.S. 592, 603, 108 S. Ct. 2047, 100 L.Ed.2d 632 (1988) ("serious constitutional question [s] . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."). The BIA lacks jurisdiction to adjudicate constitutional issues. *See Wang v. Reno*, 81 F.3d 808, 814 n. 7 (9th Cir. 1996); *Bagues-Valles v. INS*, 779 F.2d 483, 484 (9th Cir. 1985). Accordingly, under

Hose's construction, INA § 242(g) would prevent Magana-Pizano from presenting his constitutional claims before any tribunal, administrative or judicial, far short of providing a procedure "which is neither inadequate nor ineffective to test the legality of a person's detention." *Swain*, 430 U.S. at 381, 97 S.Ct. 1224.

Because section 2241 habeas relief is limited to persons in custody in violation of the Constitution or laws or treaties of the United States, it is, as we have noted, more narrow than habeas relief previously available under INA § 106. However, Magana-Pizano's petition clearly states a claim under 28 U.S.C. § 2241. He has made a colorable argument that his deportation would violate the Equal Protection and Due Process Clauses, and that his deportation is forbidden by United States statute. Thus, the gravamen of his action does not fall within the rubric of purely discretionary challenges, which some courts have held outside the scope of section 2241. *See*, e.g., *Yang v. INS*, 109 F.3d 1185, 1195 (7th Cir. 1997).

The INS contends that if habeas corpus review remains under 28 U.S.C. § 2241, it must be limited to situations in which there is a threat of a "fundamental miscarriage of justice." No such limitation appears in 28 U.S.C. § 2241, and we decline to assume a legislative role and insert additional statutory language. Section 2241 has a long and storied history, and its standards are well-developed and known. The "fundamental miscarriage of justice" requirements have been imposed judicially only in cases of successive petitions where the abuse of the writ doctrine would otherwise bar a subsequent petition. *See, e.g., Herrera v. Collins*, 506

U.S. 390, 404, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993) and *Sawyer v. Whitley*, 505 U.S. 333, 339, 112 S. Ct. 2514, 120 L.Ed.2d 269 (1992). Neither Congress nor the courts have imposed a "fundamental miscarriage of justice" requirement in a first habeas petition, and there is no statutory or judicial basis for doing so here. Thus, if a first-time habeas corpus petitioner is "in custody in violation of the Constitution or laws or treaties of the United States," the petitioner is entitled to habeas corpus relief. 28 U.S.C. § 2241(c)(3).

Accordingly, because the Suspension Clause prevents IIRIRA from foreclosing access to general statutory habeas relief in this case, Magana-Pizano may pursue his remedies under 28 U.S.C. § 2241.

IV

The INS argues that to the extent the federal courts have any jurisdiction over Magana-Pizano's habeas petition, such jurisdiction lies with the Court of Appeals. However, the plain language of 28 U.S.C. § 2241 provides an unambiguous grant of jurisdiction to the district courts, stating, "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a) (1994). We are aware of the general concerns surrounding a bifurcated system of review. However, bifurcated review of immigration matters has been the norm, not the exception. *Compare Foti v. INS*, 375 U.S. 217, 221, 84 S. Ct. 306, 11 L.Ed.2d 281 (1963) (Court of Appeals review of discretionary relief) and *Giova v. Rosenberg*, 379 U.S. 18, 85 S. Ct. 156, 13 L.Ed.2d 90 (1964) (Court of Appeals review of motion to reopen), with *Cheng Fan*

Kwok v. INS, 392 U.S. 206, 216, 88 S. Ct. 1970, 20 L.Ed.2d 1037 (1968) (district court review of denial of stay of deportation). Moreover, it is appropriate that any evidentiary hearings with respect to habeas matters take place at the district court level which is uniquely positioned to handle such issues and develop the appropriate record. *American-Arab Anti-Discrimination Committee v. Reno*, 119 F.3d 1367, 1373 (9th Cir. 1997), *cert. granted*, — U.S. ——, 118 S. Ct. 2059, 141 L.Ed.2d 137 (1998). Magana-Pizano's petition raises factual questions which are best committed to the wisdom of the district court for resolution.

Regardless of these policy considerations, in the end the choice of jurisdictional assignment is a Congressional one, and Congress vested the district courts with the power to review habeas corpus petitions. It is not only a proper choice, but one which we lack the power to judicially divest.

V

In summary, we deny Magana-Pizano's petition for review for lack of jurisdiction. We reverse the district court's dismissal of Magana-Pizano's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 for lack of jurisdiction, and remand the case to the district court with instructions to proceed to the merits of the petition. We award Magana-Pizano his costs on appeal, but the question of attorney fees is reserved until the district court decides the merits of the petition.

PETITION FOR REVIEW DISMISSED; JUDGMENT REVERSED AND REMANDED.

APPENDIX C

UNITED STATES DISTRICT CIRCUIT
FOR THE DISTRICT OF ARIZONA

CIV-97-0619 PHX SMM

DANIEL PIZANO, PETITIONER

v.

ROSEANNE SONCHIK, RESPONDENT

Filed: Apr. 8, 1997

JUDGMENT

_____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

- XX Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed without prejudice, petitioner to take nothing.

DATED at Phoenix, Arizona, this 8th day of April, 1997

RICHARD H. WEARE
Clerk of Court/DCE
By: /s/ T. CHAPMAN
Deputy Clerk
T. Chapman

CIV-21 (7/94)

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

April 7, 1997

Civil Minutes - General

Case No. 2:97-cv-00619

Title: Pizano v. Sonchik

DOCKET ENTRY

MINUTE ENTRY Judge Inits: SMM Crt Rptr: Mike Benitez. Appearances by Wendy Lestarge for pla and Hugh Milane and Cynthia Parsons for dft.

Oral argument is held on the motion for temporary restraining order to stay deportation by petitioner Daniel Magana Pizano [3-1]. The motion is denied on this case is dismissed without prejudice. The Clerk of Court shall enter argument accordingly.

[cc: CNSL/CK [12-1]

CASE ASSIGNED TO:
Hon. Stephen M McNamee, Judge

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ELOY, ARIZONA

A-35 822 607

In Deportation Proceedings

In the Matter of DANIEL MAGAÑA-PIZANO
Respondent

CHARGE: Section 241(a)(2)(B)(i) of the INA.

APPLICATION: Service Motion to Pretermit Application for Waiver under Section 212(c) of the Act.

ON BEHALF OF RESPONDENT:

Michael Franquinha, Esq.
343 W. Roosevelt St.
Phoenix, AZ 85003

ON BEHALF OF SERVICE:

Daniel Santander, Esq.
Asst. District Counsel
2035 N. Central Ave.
Phoenix, AZ 85004

MEMORANDUM DECISION AND ORDER OF THE IMMIGRATION JUDGE:

On May 17, 1996, the Service issued an Order to Show Cause charging the respondent with being deportable as articulated above. At a master calendar hearing conducted on August 14, 1996, the respondent admitted the allegations contained in the Order to Show Cause and conceded deportability as charged. Due to the respondent's admissions, the court finds the respondent deportable by clear, convincing and unequivocal evidence.

Upon further questioning the respondent indicated that he is a legal permanent resident alien who obtained such status as of 1977. To that event, respondent was invited to file an application for waiver under Section 212(c) of the Act, and an application was filed with the Court on September 25, 1996.

Under the old provisions of Section 212(c), the respondent would have been eligible to apply for a waiver of deportation. However, at approximately 12:00 pm MST on April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104-132. This legislation significantly amended Section 212(c), and removed from eligibility those aliens who are "deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i). This provision of law apparently went into effect upon the signing of the law by President Clinton, and in this Court's opinion, applies to any application for relief

which is not administratively final as of the time and date of the signing.

Therefore, the court finds the respondent is ineligible for any relief from deportation due to the respondent's criminal conviction for a controlled substances violation. As there is no waiver available to the respondent, the Service's Motion to Pretermit the respondent's application for waiver under Section 212(c) will be granted. Additionally, the law requires the court to order the respondent's deportation from the United States to Mexico, the country designated by the respondent.

ORDER: It is the order of the court that the Service's Motion to Pretermit the respondent's application for waiver under Section 212(c) by granted.

FURTHER ORDER: It is the further order of this court that the respondent be deported to Mexico.

/s/ LEE ABBOTT Date: October 4, 1996
WILLIAM LEE ABBOTT
United States Immigration Judge
Eloy, Arizona

APPENDIX F

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A35-822-607 – ELO Date: MAR 14 1997

In re: MAGANA-PIZANO, DANIEL

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

MICHAEL FRANQUINHE
343 W. ROOSEVELT DR.,
PHOENIX, AZ 85003-0000

APPLICATION: Waiver of inadmissibility

ORDER:

PER CURIAM. You are seeking relief from deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). However, you are

statutorily ineligible for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)." *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") § 440(d); *Matter of Soriano*, Interim Decision 3289 (A.G., Feb. 21, 1997). Accordingly, your appeal is dismissed.

/s/ _____
FOR THE BOARD

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Suspension of Habeas Corpus Clause of the United States Constitution, Art. I, § 9, Cl. 2, provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. Prior to April 24, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) (1994), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> **(10) Habeas corpus**
>
> any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

3. After April 24, 1996, and before September 30, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> (10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by section [1251](a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are covered by section [1251](a)(2)(A)(i), shall not be subject to review by any court.

4. Prior to April 24, 1996, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), provided:

> **Nonapplicability of subsection (a)**
>
> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be ad-

mitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

5. Effective April 24, 1996,[1] Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), provided:

Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be ad-

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[1] Section 212(c) was amended by Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, on April 24, 1996. Further technical amendments were made by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, on September 30, 1996, and those technical amendments were made effective as if they were enacted on the original enactment date of AEDPA. See p. 62a, *infra*. The version set forth in the text reflects both sets of amendments. In addition, Section 304(b) of IIRIRA, 110 Stat. 3009-597, repealed Section 212(c) entirely, but Sections 306 and 309 of IIRIRA, 110 Stat. 3009-607, 3009-625, make clear that this repeal applies only to aliens placed in removal proceedings on or after April 1, 1997. See pp. 61a-64a, *infra*.

mitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered by section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2) (A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section [1251](a)(2)(A)(i).

6. Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252 (Supp. II 1996), provides in pertinent part:

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

* * * * *

(g) Exclusive jurisdiction

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

7. Section 401(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268 (Apr. 24, 1996), provides:

> ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS.—Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) is amended—
>
> (1) in paragraph (8), by adding "and" at the end;
>
> (2) in paragraph (9), by striking "; and" at the end and inserting a period; and
>
> (3) by striking paragraph (10).

8. Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276 (Apr. 24, 1996), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996),[2] provides in pertinent part:

CRIMINAL ALIEN REMOVAL.

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[2] Section 306(d) of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, made certain technical amendments to Section 440 of AEDPA, Pub. L. No. 104-132, 110 Stat. 1276, effective as if included in the original enactment of AEDPA. See p. 62a, *infra*.

(a) JUDICIAL REVIEW.—Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:

"(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i), shall not be subject to review by any court."

* * * * *

(d) CLASSES OF EXCLUDABLE ALIENS.—Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended—

(1) by striking "The first sentence of this" and inserting "This"; and

(2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)."

9. Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No.

104-208, Div. C, 110 Stat. 3009-597 (Sept. 30, 1996) provides:

> REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.

10. Section 306 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996),[3] provides in pertinent part:

> **APPEALS FROM ORDERS OF REMOVAL (NEW SECTION 242).**
>
> * * * * *
>
> (b) REPEAL OF SECTION 106.—Section 106 (8 U.S.C. 1105a) is repealed.
>
> (c) EFFECTIVE DATE.—
>
> (1) IN GENERAL.—Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.
>
> * * * * *

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[3] Public Law No. 104-302, 110 Stat. 3656 (Oct. 11, 1996) made certain technical amendments to Sections 306 and 309 of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607, 3009-625, effective as if enacted on the original date of enactment of IIRIRA.

(d) TECHNICAL AMENDMENT.—Effective as if included in the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132), subsections (a), (c), (d), (g), and (h) of section 440 of such Act are amended by striking "any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)" and inserting "any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)".

11. Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996), provides in pertinent part:

EFFECTIVE DATES; TRANSITION.

(a) IN GENERAL.—Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

* * * * *

(c) TRANSITION FOR ALIENS IN PROCEEDINGS.—

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date—

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

* * * * *

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW.—In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary—

* * * * *

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense

covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

12. Section 2241 of Title 28, United States Code, provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * * * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

APPENDIX H

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Interim Decision #3289

In re Bartolome Jhonny Soriano, Respondent

File A39 186 067 - Napanoch

Decided June 27, 1996

Before: Board En Banc: SCHMIDT, Chairman; HEILMAN, HOLMES, VILLAGELIU, MATHON, and GUENDELSBERGER, Board Members. Concurring and Dissenting Opinion: ROSENBERG, Board Member. Dissenting Opinion: VACCA, Board Member, joined by DUNNE, Vice Chairman; HURWITZ, FILPPU, and COLE, Board Members.

HEILMAN, Board Member:

In a decision dated October 12, 1995, an Immigration Judge found the respondent deportable as charged, denied his application for a waiver of inadmissibility pursuant to section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994), and ordered him deported from the United States to the Dominican Republic. The respondent appealed from that decision

on October 23, 1995. Subsequent to the respondent's appeal, Congress amended section 212(c) of the Act, and the Immigration and Naturalization Service has now filed a supplemental brief in response to the respondent's argument, asserting that the recent legislative amendments preclude the respondent from demonstrating his continuing eligibility for section 212(c) relief.[1] Thus, we are faced with the issue regarding the effective date of section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 ("AEDPA"). We find the respondent eligible for section 212(c) relief, but will deny his appeal as a matter of discretion.

I. PROCEDURAL HISTORY

The respondent is a native and citizen of the Dominican Republic. He entered the United States on March 28, 1985, as a lawful permanent resident. On May 20, 1992, the respondent was convicted under the law of the State of New York of the offense of attempted criminal sale of a controlled substance. Based on this conviction, the Service initiated deportation proceedings against the respondent with the issuance of an Order to Show Cause and Notice of Hearing (Form I-221) dated June 3, 1994. On April 28, 1995, the respondent filed an Application for Advance Permission to Return to Unrelinquished Domicile (Form I-191) pursuant to section 212(c) of the Act. By order dated October 12, 1995, the Immigration Judge found that the respondent was eligible for relief under section 212(c) of the Act, but denied that application in the exercise of

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[1] We acknowledge the contribution of amici in the briefing of this issue to the Board.

discretion. On appeal, the respondent argues that the Immigration Judge erred in the exercise of that discretion.

II. APPLICABLE LAW

Prior to considering the respondent's appeal of the Immigration Judge's discretionary determination, this Board must first address the Service's contention that the recent amendments to section 212(c) of the Act statutorily bar the Board from considering the merits of the respondent's appeal from his section 212(c) application. We note initially that the respondent was clearly eligible for such relief under the law in effect at the time the Immigration Judge rendered his decision.[2]

However, during the pendency of the respondent's appeal from the Immigration Judge's discretionary denial of his application, Congress amended section 212(c) of the Act to read as follows:

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[2] Until April 24, 1996, section 212(c) of the Act read as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of section (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion invested in [her] under section 211(b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of section (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion invested in [her] under section 211(b). *This section shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).*

Section 440(d) of the AEDPA, 110 Stat. at 1277 (emphasis added).

The respondent, deportable by reason of having committed an offense covered by sections 241(a)(2)(A)(iii) and (B) of the Act, falls within the last sentence of the AEDPA amendment. Thus, we must decide whether Congress intended the respondent to remain eligible for section 212(c) relief after April 24, 1996.

III. EFFECTIVE DATE

Congress did not incorporate an express provision regarding the effective date of section 440(d) of the AEDPA. Initially, then, we must discern the date on which this section of law became effective, and, if effective immediately, whether it applies to those aliens

already in proceedings as of April 24, 1996. If it does so apply to those aliens in proceedings, we must further determine whether the amendment applies to those aliens who filed their section 212(c) applications by April 24, 1996. In resolving these issues of the AEDPA's temporal applicability, we first look to the language of the statute itself. We begin by noting that the paramount index of congressional intent is the plain meaning of the words used in the statute taken as a whole. *See Matter of Grinberg*, 20 I&N Dec. 911 (BIA 1994) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987)); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (stating that in ascertaining the "plain meaning" of a statute, one "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole").

A. SECTION 440(D) AND PENDING PROCEEDINGS

Initially, we find persuasive evidence to conclude that Congress intended section 440(d) to apply immediately, regardless of whether the Service had placed an alien in proceedings by April 24, 1996. Both general statutory construction and an examination of Congress' inclusion of other effective dates in the AEDPA lead us to this result. General rules of statutory construction hold that the lack of an effective date for legislation indicates that the law should be effective on the date of passage. *See generally* 2 C. Sands, *Sutherland Statutory Construction* § 33.08 (4th ed. 1973). We find no obstacle to the application of this rule in the language of the AEDPA; rather, we find such an interpretation buttressed by Congress' decision to expressly delay the effective date of other subsections of the AEDPA. For example, in section 414(b) of the AEDPA, 110 Stat. at

1270, Congress expressly provided that this amendment "shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of [the AEDPA]." Similarly, in section 442 of the AEDPA, 110 Stat. at 1280, Congress amended section 242A(b) of the Act with regard to certain procedural aspects of deportation hearings and stated, in subsection 442(d), that those amendments "shall apply to all aliens against whom deportation proceedings are initiated after the date of the enactment of [the AEDPA]." The absence of similar language in section 440(d) supports the conclusion that Congress intended section 440(d) of the AEDPA to apply to aliens already in proceedings on April 24, 1996. These express declarations in other subsections of the AEDPA, in conjunction with Congress' silence in section 440(d) of the AEDPA, lead us to conclude that section 440(d) was effective immediately upon enactment and was not limited in applicability to those aliens whose proceedings were initiated after that date.

B. PENDING APPLICATIONS

However, this finding that section 440(d) of the AEDPA was effective immediately and not limited in application to those aliens brought into proceedings after April 24, 1996, does not finally resolve whether this respondent is barred from section 212(c) relief. There remains a subcategory of aliens, including the respondent, who already had applications for section 212(c) relief pending on April 24, 1996. Such aliens include those deportable aliens awaiting their section 212(c) merits hearings, as well as those aliens who have appealed the Immigration Judge's denial of their applications, and those who, having received a grant of

section 212(c) relief, are subject to a Service appeal of the Immigration Judge's decision. In determining congressional intent from the language and design of the AEDPA as a whole, we do not find that Congress' silence regarding the effective date of section 440(d) reflects an intent for the amendment to bar pending applications for section 212(c) waivers. In reaching this conclusion, we note that in section 413 of the AEDPA, which bars alien terrorists from most forms of relief from deportation, Congress expressly indicated that those bars to relief "shall take effect on the date of enactment of the AEDPA and shall apply to applications filed before, on, or after such date if final action has not been taken on them before such date." *See* section 413(g) of the AEDPA, 110 Stat. at 1269-70.

Another basic rule of statutory construction instructs that no provision of law should be so construed as to render a word or clause surplusage. See *Kungys v. United States*, 485 U.S. 759 (1988); *Colautti v. Franklin*, 439 U.S. 379 (1979). By adding the effective date found at section 413(g) of the AEDPA, Congress expressed its clear intent that section 413 of the AEDPA apply specifically to pending applications of alien terrorists. To construe this same intent by Congress' silence in section 440(d) of the AEDPA would require us to conclude that the "before, on, or after" language of section 413(g) of the AEDPA is unnecessary and irrelevant to whether that section applies to applications for asylum pending before the AEDPA's enactment. This we decline to conclude. Rather, we interpret Congress' omission of the "before, on, or after" language in section 440(d) to indicate its intent that aliens with applications pending on April 24, 1996, should not be statutorily

barred from section 212(c) relief by operation of the AEDPA.[3]

This conclusion is consistent with the approach to statutory interpretation set forth by the United States Supreme Court in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). In that case, the Supreme Court observed that when deciding whether changes in law should be applied to pending controversies in the absence of express congressional directive, "settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products, supra*, at 1497. By applying section 440(d) of the AEDPA to only those applications for section 212(c) relief filed on or after the date of the enactment of the AEDPA, the unique expectations of aliens whose applications for section 212(c) relief were pending prior to the enactment of the AEDPA are not disrupted. Such aliens demonstrated, with the filing of their pre-AEDPA applications, their expectation that although they were deportable under various provis-

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[3] Similarly, we note that silence cannot reasonably be interpreted as evidencing a congressional intent to apply the new limitations in section 212(c) only to those aliens whose *convictions* for the relevant offenses occurred on or after the date of enactment of the AEDPA because Congress expressly stated that result in the AEDPA when such was its intent. *See* section 440(f) of the AEDPA, 110 Stat. at 1278 (stating that the amendments to the aggravated felony definition "apply to convictions entered on or after the date of enactment"). Moreover, as regards the issue of "settled expectations" discussed below, both the Board and the courts have noted that aliens cannot reasonably argue "'that they somehow relied on the availability of a discretionary waiver of deportation when choosing to engage in [criminal] activity.'" *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 964 (BIA 1995) (quoting *DeOsorio v. United States INS*, 10 F.3d 1034, 1042 (4th Cir. 1993)).

ions of the Act, they would be able to present evidence of favorable social and humane considerations that might countervail evidence of their undesirability as lawful permanent residents. *See generally Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). The interpretative approach enunciated by the Supreme Court in *Landgraf* supports the conclusion that Congress did not intend by its silence to disrupt the expectations of those aliens whose applications for section 212(c) relief were pending on April 24, 1996.

Moreover, this conclusion is consistent with the approach adopted by Congress with its amendment of section 212(c) of the Act by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, in which a statutory 5-year aggravated felony bar to that relief was made applicable to aliens who applied after the date of the enactment of that 1990 amendment. *See Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 963 (BIA 1995).

C. APPLICABILITY TO RESPONDENT'S SECTION 212(C) REQUEST

The respondent applied for section 212(c) relief on April 28, 1995, prior to the April 24, 1996, enactment of the AEDPA. Accordingly, the bar to section 212(c) relief added by the amendment of that section by section 440(d) of the AEDPA does not apply to the respondent's application for relief. There is no question that the respondent is eligible for section 212(c) relief by the version of that section that was in effect prior to its amendment by section 440(d) of the AEDPA. That is, the respondent is not an alien convicted of an aggravated felony who served for such felony a term of imprisonment of at least 5 years. Thus, we find the

respondent eligible for relief under section 212(c) of the Act, and we proceed to the question of whether he merits that relief in the exercise of discretion.

III. DISCRETION

Notwithstanding the respondent's continued eligibility for a waiver of inadmissibility, we ultimately disagree with his appellate argument that the Immigration Judge erred in finding that he did not warrant a discretionary waiver pursuant to section 212(c) of the Act. As the Immigration Judge correctly noted, the respondent's attempted criminal sale of cocaine, in addition to his three other drug-related felonies, require a demonstration of outstanding or unusual equities before the respondent may receive a section 212(c) waiver of inadmissibility. *See Matter of Marin, supra*; *cf. Matter of Burbano*, 20 I&N Dec. 872, 879 (BIA 1994). We agree with the Immigration Judge that the respondent has failed to demonstrate such equities so that he may overcome his serious and recent drug trafficking crimes.

The respondent testified at the hearing that he has various family ties in the United States, including his mother, two siblings, and his United States citizen son. Moreover, the respondent explained that his son lives with his ex-wife, and that his family assists them financially. The respondent's mother and sister also testified on his behalf, and while we find it noteworthy that the respondent's family members attended the hearing, we do not find that this familial support alone rises to the level of outstanding or unusual. The respondent maintains various family ties in the Dominican Republic, including three daughters and four siblings. He arrived

in the United States only 10 years ago as a 25-year-old adult, and his employment during his residence in the United States has been sporadic.

Regarding his rehabilitative efforts, we note that the respondent testified that he has participated in a drug rehabilitation program while he has been incarcerated, and that after 18 years of drug use, he has maintained a drug-free lifestyle while in prison. Moreover, he testified that he has also received his GED while incarcerated, and he has recently strengthened his religious beliefs. We agree with the Immigration Judge that the respondent has demonstrated a willingness to continue his progress towards a drug-free and crime-free lifestyle and has taken steps towards rehabilitation. *See Matter of Arreguin*, Interim Decision 3247 (BIA 1995). However, considering these factors in conjunction with his family ties here and abroad, and his relatively short period of residence in the United States, we can not find that the respondent has demonstrated sufficient equities to overcome his four recent drug trafficking felonies. *Cf. Matter of Burbano, supra.* Accordingly, we will dismiss the respondent's appeal.

ORDER: The appeal is dismissed.

CONCURRING AND DISSENTING OPINION: Lory D. Rosenberg, Board Member

I respectfully concur in part and dissent in part.

Our decision today seeks to resolve the ambiguity presented by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 (enacted Apr. 24, 1996) ("AEDPA"), which amends the category of otherwise eligible lawful permanent resident aliens precluded from a waiver under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c)(1994).

The text of this section, as set forth by the majority, contains no express provision specifying an effective date for this amendment. The majority opinion properly recognizes that the fact that the AEDPA became law on April 24, 1996, is not dispositive of the effect of section 440(d) on an alien who "is deportable" on the grounds of deportability designated in that section.[1]

In essence, we hold that two related factors, traditional principles of statutory construction and Supreme

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[1] This "ill-advised" provision of AEDPA is less than artfully drawn, having been enacted at the 11th hour as part of a bill ostensibly addressing the deportation of terrorists, not the deportation of "long-term legal residents." *See* President's Remarks on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 717 (Apr. 29, 1996). While section 440(d) refers to those "deportable by reason of having committed any criminal offense covered" by specified sections of the Immigration and Nationality Act, the only aliens so deportable are aliens who actually have been convicted of such offenses.

Court law interpreting the application of new statutes to pre-existing circumstances, must control the reach of this provision of the AEDPA. *See Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994). In the context of the appeal before us, it is necessary only to find, as the majority does, that the amendment does not apply to pending applications already filed by aliens in deportation proceedings. Thus, the respondent, who is deportable by reason of a conviction for a covered offense, remains eligible to have his pending application for a waiver of deportability under section 212(c) determined. For purposes of the scenario presented in this appeal, I concur.

I. THE SILENCE OF THE STATUTE

The silence of the statute with regard to its impact upon conduct and other events which already have taken place is significant. Nothing in the text or the legislative history of the AEDPA indicates that section 440(d) should be applied retroactively to pending cases or pre-amendment circumstances, or that this silence was due to an "accident of draftsmanship." *INS v. Phinpathya*, 464 U.S. 183, 191 (1984). By contrast, as the majority discusses, other sections of the AEDPA expressly address the effect of the particular provision on circumstances existing prior to its enactment. *See, e.g.*, section 413(g) of the AEDPA, 110 Stat. at 1269-70.

As recognized consistently by the Supreme Court, retroactivity is not favored in the law. *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988). A presumption against retroactivity generally is consistent with legislative and public expectations as a safeguard against unfairness. *Landgraf v. USI Film*

Products, supra, at 1501. This principle dates back to English common law, and even to Roman law. *See, e.g., United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806); *Dash v. Van Kleeck*, 7 Johns. 477, 502-03, 505 (N.Y. 1811) (the prince may enact a retrospective law as long as it is done expressly).[2]

In *Landgraf v. USI Film Products, supra*, the Supreme Court restated the principle that a statute shall not be given retroactive effect unless expressly provided by Congress. Specifically, the Supreme Court cautioned that "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct which occurred prior to that date." *Id.* at 1493.

To the extent that the majority decision is understood to mean either that the language in the statute as a whole is reconciled or that the *Landgraf* principles, discussed below, are properly observed only by finding that aliens who have *filed applications* for section 212(c) waivers by April 24, 1996, are not subject to section 440(d), I must differ. I write separately because I believe this Board's decision requires clarification on these points.

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[2] *See Demelo v. Cobb*, No. 96-10903-REK (D. Mass. June 19, 1996) (discussing the specific language in the AEDPA relating to restrictions upon release from custody, and concluding that any interpretation of the Act applying it to offenses committed before April 24, 1996, (and convictions obtained before that date) would raise serious constitutional issues).

II. STATUTORY CONSTRUCTION AND RETROACTIVIT

As the agency implementing the statute, we recognize that a statutory construct involving silence in one provision but not another requires us to give effect to each provision. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (holding that the Board may not blur the distinctions between two related but separate statutory standards or reduce them into one); *Matter of Hou*, 20 I&N Dec. 513 (BIA 1992) (recognizing that Congress' use of different terminology in two sections of the statute requires the Board to give each independent effect).

In fact, this is precisely what was done by this Board in *Matter of A-A-*, 20 I&N Dec. 506 (BIA 1992), where we looked to the statutory language in various sections of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, in order to determine the applicability of the amendment of section 212(c) contained in that enactment. Although the section was silent as to its applicability to prior convictions, the express language of the statute made that amendment applicable to pending applications.[3]

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[3] I note that our decision in *Matter of A-A-*, *supra*, also involved a situation, not present here, in which a retroactive application was necessary in order for the law to be effective. *See also Matter of Gomez-Giraldo*, 20 I&N Dec. 957 (BIA 1995) (finding 5-year incarceration bar would be delayed for 5 years if not applied to prior convictions).

Coupled with the principle enunciated by the Supreme Court in *Landgraf v. USI Film Products*, *supra*, at 1497, that when new provisions attach new legal consequences to prior events, "settled expectations should not be lightly disrupted" (unless Congress expressly states such an intent), these precepts militate in favor of adjudicating the respondent's waiver application according to the prior law. For the sake of brevity, I will refer to these two considerations—the requirement that we must interpret silence in a provision so as to give effect to the whole statute, and the doctrine of settled expectations as foreclosing the retroactive application of a new or amended statute to prior conduct—as the "*Landgraf* principles."

Semantic sparring over whether a new provision can be retroactive because it is being applied to an adjudication we are conducting in the present is not a useful exercise. Nonetheless, the dissent focuses on the application, which is a continuing one, rather than on past events and expectations which are settled, and avoids addressing the issue. The issue is whether the new provision *operates* retroactively. That is, does it affect the settled expectations of the parties, in this case, the respondent, as best described in the *Landgraf* principles.[4] Moreover, this Board previously has acknowledged that eliminating section 212(c) relief *does* have

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[4] The predisposition against a retroactive construction of laws which operate to affect prior conduct is the principle that an individual should be able to act with reasonable certainty of the legal consequences. *See Chew Heong v. United States*, 112 U.S. 536, 559 (1884); *see also* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960).

retroactive effect. *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 963 (BIA 1995); *Matter of A-A-*, *supra*.

In this instance, even though the determination of eligibility for a waiver under section 212(c) may be prospective, the restriction in the amended provision has a retroactive operation or effect as it constitutes a new legal consequence which attaches, at a minimum, to any lawful permanent resident already subject to an Order To Show Cause or otherwise in the agency "pipeline." It is arguable that the legal consequences attach, in fact, to the conviction itself and even to the commission of the offense. Thus, as I discuss below, I believe that to find the amended provision applicable to all applications, as does the dissent, or only to already-filed and pending applications, as does the majority, falls short of the proper observance of the *Landgraf* principles.

A. *Landgraf* Principles and Board Precedent

Previously, the Board held that where new statutory provisions affecting eligibility for relief from deportation come into effect during the pendency of a deportation hearing or an administrative appeal to this Board, and there exists no statutory directive to the contrary, the new statutory provisions shall be applied to the application for relief before us, and the application may be denied on the basis of the statutory amendment. *Cf. Matter of U-M-*, 20 I&N Dec. 327 (BIA 1991), *aff'd*, 989 F.2d 1085 (9th Cir. 1993). Although the dissent clings to this position, it simply is not applicable here.

Since our decision in *Matter of U-M-*, *supra*, the United States Supreme Court issued its decision in

Landgraf v. USI Film Products, supra, in which it comprehensively discussed the issue of the application of statutory amendments to pending controversies. As I understand the dissent to assert that a silent statute is not only effective when signed by the President, but applies to all prior or pending events or conduct, I note that in *Landgraf,* the Supreme Court reconciled the apparent conflict between the presumption that "a court must apply the law in effect at the time it renders its decision," and the presumption against retroactivity. *Landgraf v. USI Film Products, supra,* at 1486-87 (citing *Bradley v. Richmond School Board,* 416 U.S. 696, 711 (1974)).

In fact, in *Matter of Gomez-Giraldo, supra,* in which we last visited the impact of the Supreme Court's reasoning in *Landgraf v. USI Film Products, supra,* we held that the aggravated felony bar added to section 212(c) of the Act by a previous amendment implicated none of the concerns enunciated in *Landgraf.* We reasoned that, because that amendment, by its express terms, applied only to those applications for relief made on or after the effective date of the amendment, it would not disturb a lawful permanent resident's settled expectations that he or she could apply for and be granted a waiver under section 212(c). *Matter of Gomez-Giraldo, supra,* at 963-64. Our holding today, relating to an amendment with no express language, is entirely consistent with that decision and the reasoning underlying it.

B. *Landgraf* Principles and Factual Scenarios Under Section 440(d)

In *Landgraf v. USI Film Products*, *supra*, the Supreme Court set out a basic test to determine whether a statute would operate "retroactively" or "retrospectively" if applied to a case pending at the time of the statute's enactment. The Court stated that the question a body must ask is "whether the provision attaches new legal consequences to events completed before its enactment." *Id.* at 1499.

The first question presented is, which cases, if any, in the agency "pipeline" are affected? The majority limits its determination to persons who have already filed applications for relief under section 212(c). There remains an open question, however, whether the amendment applies to all potential candidates for the waiver already "in the pipeline."

Arguably, the "pipeline" could include various categories of individuals who are alleged to be deportable under the pertinent sections of the statute, and who are otherwise eligible for and require the grant of a waiver under section 212(c) in order not to be deported. Assuming the main, more comprehensive group to be putative candidates who have been identified by the Immigration and Naturalization Service as deportable aliens is consistent with the *Landgraf* principles.

This could encompass aliens who are the subject of a "detainer" placed against them during their incarceration for a criminal offense as the result of a request by the Service; it could include those served with an Order to Show Cause issued by the Service; and it could

include those subject to an Order to Show Cause against whom deportation proceedings have commenced as defined under the regulations. It could include those who have filed an application for a waiver under section 212(c) in proceedings before an Immigration Judge; those who are seeking to reopen to apply for 212(c) relief; and those who have received an order from an Immigration Judge from which an appeal has been taken to the Board and/or to the circuit courts of appeal.

In particular, this Board only recently recognized decisions of the United States Courts of Appeals for the Second, Seventh, and Ninth Circuits, which hold that the statutory language of section 212(c) makes plain that an alien may establish lawful domicile while in a status other than that of a permanent resident. *See Matter of Cazares*, Interim Decision 3262 (BIA 1996) (holding that a temporary resident under section 245A of the Act may accrue time towards 7-year lawful domicile requirement of section 212(c)). Further, the Fifth Circuit held specifically that temporary residents under both the legalization (section 245A) and special agricultural worker ("SAW") (section 210) provisions may accrue lawful domicile while in that status. *See White v. INS*, 75 F.3d 213 (5th Cir. 1996).

This Board has remanded appeals from decisions arising in those circuits to allow applications for section 212(c) to be filed and heard in the first instance or for a hearing on the merits when such was pretermitted by the Immigration Judge. The majority overlooks these cases; while not explicitly implicated in our decision today, the truncated interpretation of the majority leaves unresolved hundreds of cases of individuals who

we found to have been entitled to consideration at least under controlling circuit law, but whose applications were unlawfully pretermitted and foreclosed. In my view, such applicants are entitled to the opportunity to seek relief from deportation under section 212(c) whether or not they have a pending application on file. *See Snajder v. INS*, 29 F.3d 1203 (7th Cir. 1994).

The next question is whether the amendment applies to aliens convicted of any offense which would render them subject to deportation proceedings on charges referenced in section 212(c), as amended, and ineligible to apply for or be granted a waiver under that section. In the first published opinion on a provision of the AEDPA, the District Court of Massachusetts, construing section 440(c), posited that it was untenable that Congress could have intended that the terms of the provision apply other than to persons convicted on or after the April 24, 1996 effective date. *Demelo v. Cobb*, No. 96-10903-REK (D. Mass. June 19, 1996). Section 440(c) refers to custody requirements applicable to the exact same categories of aliens affected by the operation of section 440(d).

One difference between the language in section 440(c) and that in section 440(d) is that the plain language of section 440(c) amends section 242(a)(2) of the Act, which mandates the Attorney General to take into custody any alien "*convicted of* [the same offenses specified in amended section 212(c)] . . . upon release of the alien from incarceration." (Emphasis added.) By contrast, the language of section 440(d) amends section 212(c) to read that the provision "shall not apply to an alien who *is deportable* by reason of having committed an offense." (Emphasis added.)

As the majority states, silence cannot reasonably be interpreted as supporting a "settled expectation" of being able to engage in criminal activity without consequences. However, I part ways with the majority when they declare that individuals may not have "settled expectations" with regard to an opportunity to seek a section 212(c) waiver that affects a plea of guilty or other trial or appellate choices.

III. LANDGRAF PRINCIPLES AND MANIFEST INJUSTICE

In the absence of specific language, the reach of the statute depends upon settled expectations. This doctrine is different from, but enhanced by, that of "manifest injustice."

The human consequences of the AEDPA which are implicated by the legal question before us are compelling. I believe this is especially important to note in light of the fact that our decision today denies the requested relief from deportation. Waivers under section 212(c) are not easily obtained; to the contrary, they are perhaps the most difficult and hard won of any forms of discretionary relief over which we exercise our jurisdiction. At stake is an alien's ability to remain in this country as a permanent resident, which is determined by balancing the good of society as a whole against the individual social and humane considerations that may pertain to any one case. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

Such waiver applications are individual and fact bound, and they are properly left to the exercise of discretion by Immigration Judges in individual cases,

subject to the de novo review authority of this Board. While applicants for section 212(c) waivers share the adverse factor of having been convicted of a criminal or other immigration offense or offenses which renders them subject to deportation, they are as individual as humans can be and as human experience allows.

Applicants for waivers under section 212(c), until now, have included persons convicted of a single, possibly victimless or nonviolent crime or crimes over a discrete period of their stay in the United States, who have acknowledged their wrongdoing and changed their behavior. They include individuals who came to this country with their families as infants; adults who have neither spoken their native language nor been in their native country since childhood; fathers, mothers, and single parents of United States citizen children; businessmen and women who employ United States citizen workers in legitimate occupations; caretakers of elderly United States citizen parents; victims of domestic violence; and refugees. While they are not free of responsibility for their mistakes, they have paid, often dearly, for their transgressions in the criminal justice system, and they cannot all be said to unilaterally present a menace or threat to our society such that deportation is warranted.

I find compelling policy and practical reasons to go beyond such a limited interpretation as the one the majority proposes in this case. All of these people, and no doubt many others, had settled expectations to which they conformed their conduct. *Landgraf v. USA Film Products, supra,* at 1497, instructs that those "settled expectations should not be lightly disrupted." "Retroactive application of laws is undesirable where

advance notice of the change in the law would motivate a change in an individual's behavior or conduct." *Griffon v. United States Dept. of Health and Human Services*, 802 F.2d 146, 153 (5th Cir. 1986) (citing *Alexander v. Robinson*, 756 F.2d 1153 (5th Cir. 1985)).

Statutes may not be applied retroactively where doing so would result in manifest injustice to those affected. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974). Here, manifest injustice would result to a significant number of legal residents, because, while otherwise eligible, their right to apply for a section 212(c) waiver will have been infringed. Moreover, I note the inevitable disparity in treatment accorded different individuals that would result, because otherwise eligible legal residents requiring a waiver have no control over when proceedings are commenced or how quickly or in what order hearings and appeals are set or adjudicated. *See Dion v. Secretary of Health and Human Services*, 823 F.2d 669, 672 (1st Cir. 1987) (finding a retroactive application inappropriate where a disparity among applicants would result).

Further, although no legal resident has the absolute right to be granted section 212(c) relief, eligible residents do have a vested right to apply and be considered for such relief. *See, e.g., Rabiu v. INS*, 41 F.3d 879 (2d Cir. 1994); *Snajder v. INS*, *supra*, at 1207-08; *Batanic v. INS*, 12 F.3d 662, 667 (7th Cir. 1993). For example, a respondent's counsel might have been ineffective in failing to file a section 212(c) application on behalf of an otherwise eligible respondent. *Rabiu v. INS*, *supra*. The Service may have violated a regulation denying the respondent the right to counsel. *Snajder v. INS*, *supra*; *Batanic v. INS*, *supra*. The

Immigration Judge might have wrongfully denied the respondent's motion for a change in venue that prejudiced his or her rights to a fair hearing. *Campos v. Nail*, 43 F.3d 1285 (9th Cir. 1994). The Immigration Judge might have failed to notify the respondent of relief for which he or she was apparently eligible. *Bui v. INS*, 76 F.3d 268 (9th Cir. 1996).

In any of these cases, I believe due process and fundamental fairness would dictate that we accept the case for consideration of section 212(c) relief, nunc pro tunc. Even while acknowledging the absence of statutory authority to do so, this Board has long granted nunc pro tunc relief to cure various defects in proceedings, if such treatment would dispose of a case. *Matter of Garcia*, Interim Decision 3268 (BIA 1996); *see also Matter of Lok*, 18 I&N Dec. 101, 107 (BIA 1981), *aff'd*, 681 F.2d 107 (2d Cir. 1982).

IV. CONCLUSION

I would find that section 440(d) of the AEDPA operates retroactively if applied not only to pending section 212(c) applications, but to other prior events. It would attach a new legal consequence to both a pre-amendment charge or finding of deportability under most of the provisions found at section 241(a)(2) of the Act. Prior to the amendment, a person entering into plea agreements or found deportable under those sections who were otherwise eligible could rely upon an opportunity to present evidence of social and humane considerations to countervail evidence of their undesirability as a permanent resident in order to demonstrate that the granting of section 212(c) relief appeared to be in the best interest of the United States. *Matter of*

Marin, supra, at 584. To upset those settled expectations by retroactively applying section 440(d) of the AEDPA, without the express directive of Congress requiring such an application, attaches a new legal consequence to conduct and events already completed by April 24, 1996. It would require us to disregard the concerns articulated by the Supreme Court in *Landgraf v. USI Film Products*, *supra*, and, in my view, would contravene both practical considerations and fundamental fairness.

DISSENTING OPINION:

Fred W. Vacca, Board Member, in which Mary Maguire Dunne, Vice Chairman, Gerald S. Hurwitz, Lauri S. Filppu, and Patricia A. Cole, Board Members, joined.

I respectfully dissent.

As stated by the majority, the issue before us is to determine the effective date of section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 (enacted Apr. 24, 1996) ("AEDPA"), and if effective on enactment, to decide which aliens who were eligible for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994), are affected by the amendment. I agree with the majority's finding that general principles of statutory construction lead directly to the conclusion that the amendment took effect on the date of enactment, absent the inclusion of an alternative effective date. Therefore section 440(d) of the AEDPA applies immediately to aliens in proceedings. *See Matter of U-M-*, 20 I&N Dec. 327, 332 (BIA 1991), *aff'd*, 989 F.2d 1085 (9th Cir. 1993).

However, I part company with the remainder of the analysis employed by the majority with respect to the applicability of section 440(d) to pending applications for section 212(c) relief. I do not view the fact that Congress specifically barred pending applications for relief by alien terrorists, as set forth in section 413(g) of the AEDPA, 110 Stat. at 1269-70, to in any way dictate or even guide us in determining whether section 440(d) applies to pending section 212(c) applications. For com-

parison purposes, I cannot determine the relevant effective date from looking at the four corners of the statute to the extent that Congress employed a wide variety of effective dates throughout the AEDPA, including prospective dates. I conclude that we are compelled to apply the provisions of section 440(d) to all pending section 212(c) applications.

This Board has consistently held that an application for relief from deportation is an ongoing application. *Matter of U-M-*, *supra*, at 332. The law that applies to the application is the law that exists at the time the final administrative decision is made. *Ziffrin v. United States*, 318 U.S. 73 (1943); *Matter of U-M-*, *supra*. A final administrative decision is made when the Board renders its decision in a case on appeal or certification, or where no appeal is taken, the right to appeal is waived, or the time allotted for appeal has expired. *See Matter of Lok*, 18 I&N Dec. 101 (BIA 1981), *aff'd*, 681 F.2d 107 (2d Cir.1982); 8 C.F.R. §§ 3.1(d)(2), 3.39 (1995).

This Board has also held that an application for section 212(c) relief filed in the context of deportation proceedings is equivalent to one made at the time an alien physically seeks admission into the United States. *Matter of A-A-*, 20 I&N Dec. 492, 502 n.22 (BIA 1992). Thus, in addition to qualifying as a person whose ongoing application for relief is subject to the existing law while under administrative review, the section 212(c) applicant also stands as an individual seeking entry to the United States, and his admissibility is determined on the basis of the facts and the law that exist at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992).

Furthermore, like the majority, I find additional support for my position in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). In *Landgraf* the Supreme Court stated:

> Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.

Id. at 1501.

Prospective relief has been defined by the Supreme Court as relief that operates in futuro, such as injunctive relief. *See American Steel Foundaries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921). This is in contrast to relief that operates "retroactively," such as damages and restitution. *See Hutto v. Finney*, 437 U.S. 678, 695 n. 24 (1978).

The Supreme Court has specifically held that statutory provisions that alter or affect forms of prospective relief are to be given effect upon the effective date of the legislation and should be applied to pending suits. *American Steel Foundries v. Tri-City Central Trades Council, supra*, at 201; *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464 (1921); *see also Hall v. Beals*, 396 U.S. 45 (1969). The Court has further held that parties to an action do not have vested rights to prior judgments conferring forms of prospective relief while their cases remain subject to appellate review. *See American Steel Foundries v. Tri-City Central Trades Council, supra*; *Duplex Co. v. Deering, supra*; *see also Raferty V. Smith Bell & Co.*, 257 U.S. 226 (1921).

Therefore, the ultimate right to prospective relief must be determined at the time of final administrative or judicial review.

Like injunctive relief, relief from deportation under section 212(c) of the Act is prospective in nature. *See Matter of K-L-*, 20 I&N Dec. 654, 658 (BIA 1993), *aff'd*, *Lee v. INS*, 12 F.3d 1102 (8th Cir. 1993) (referring to section 212(c) relief as prospective). Under the Immigration and Nationality Act, an alien's right to benefit from a waiver under section 212(c) can only be determined at the time of a hearing and upon a finding of excludability or deportability. Relief under section 212(c) therefore operates in futuro and does not nullify the fact that the alien, prior to applying for the waiver, was either excludable or deportable. Convictions alleged to be grounds for excludability or deportability do not disappear from an alien's record for immigration purposes upon a grant of relief under section 212(c). *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991). Hence, section 440(d) of the AEDPA amends a prospective form of relief and accordingly should be applied to all cases before this Board that remain subject to our appellate review. *See Landgraf v. USI Film Products*, *supra*; *American Steel Foundaries v. Tri-City Central Trades Council*, *supra*.

In light of the above case law, I am hard pressed to identify a basis for not applying section 440(d) of the AEDPA to all section 212(c) applications that are pending adjudication or review. The weight of authority clearly requires the Board to apply the new law, as the law was changed before a final administrative decision had been rendered. Furthermore, applying the amended section 212(c) provisions to pending appli-

cations does not offend any of the concerns underlying the retroactive operation of new statutes. *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 963 (BIA 1995).

Due to the nature of an application for a waiver under section 212(c), which is a continuous application until the conclusion of final administrative action, the effect of applying section 440(d) to pending applications is not retroactive. The only expectation an alien seeking to apply for section 212(c) waiver can rely on is that his application will be considered according to the law and facts as they stand at the time of final administrative review. In this context, it has long been true that an alien whose circumstances improve through the acquisition of an additional equity can move the Board to remand a pending matter for reconsideration of the discretionary aspect of his section 212(c) application in light of the new evidence. *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

Finally, I am concerned with the majority's preferred choice of the date of filing the section 212(c) application as being determinative of which applications can be evaluated under the pre-AEDPA statutory provisions. This effective date is not contained elsewhere in the AEDPA. Moreover, there are numerous other dates that could be selected, e.g., the date the crime giving rise to the ground of deportability occurred, the date of issuance of the Order to Show Cause, the date on which a finding of deportability was rendered, and the date of filing the application.

The majority claims support for its selected effective date in the Supreme Court's analysis in *Landgraf v. USI Film Products, supra.* However, under *Landgraf*,

we consider whether the new statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed" in determining whether a statute would have retroactive effect. *Id.* at 1505. These concerns of retroactivity, as enunciated in *Landgraf*, apply to the relevant past act. For section 440(d) purposes, this act occurs when the alien committed the crime that underlies the charge of deportability.

The majority appears to neglect this aspect of the retroactivity issue in its determination that applications filed by the date of enactment of the AEDPA are to be adjudicated under the former section 212(c) provisions so as not to unfairly disrupt the "unique expectations" of aliens at the time of filing. In my opinion, the expectations that an alien has at the time of filing an application under section 212(c) of the Act are largely irrelevant in determining whether section 440(d) of the AEDPA operates retroactively. Section 440(d) does not alter the rights an alien had at the time he committed the crime. Upon the commission of a criminal act that triggers deportability, an alien now stands, as he would have stood before, facing the prospect of criminal liability, as well as deportation from the United States. *See Scheidemann v. INS*, 83 F.3d 1517 (3d Cir. 1996).

In the face of congressional silence as to the effective date of section 440(d), the judicial default rules direct us to apply the law as of the date of enactment absent retroactive effect, which is not implicated here. The majority offers no persuasive analysis to support its

conclusion that the traditional default rules do not govern here. Accordingly, I dissent.

APPENDIX I

[logo omitted]

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C. 20530

IN RE: MATTER OF BARTOLOME JHONNY SORIANO

IN DEPORTATION PROCEEDINGS

ORDER NO.

Pursuant to 8 C.F.R. § 3.1(h)(iii), the Commissioner of the Immigration and Naturalization Service has referred to me for review the decision of the Board of Immigration Appeals (BIA) in Matter of Bartolome Jhonny Soriano (A39 186 067) (July 18, 1996). I hereby grant the Commissioner's request for review and vacate the opinion of the BIA pending my further determination.

September 12, 1996
Date

/s/ JANET RENO
JANET RENO
Attorney General

APPENDIX J

[seal omitted]

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C. 20530

Matter of Soriano, BIA. Int. Dec. No. 3289 (1996)

IN DEPORTATION PROCEEDINGS

At the request of the Commissioner of Immigration and Naturalization, the Board of Immigration Appeals ("BIA") referred its decision in this matter pursuant to 8 C.F.R. § 3.1(h)(iii). Respondent Soriano, a native and citizen of the Dominican Republic, was admitted to the United States in 1985 as a lawful permanent resident alien. In 1992, he was convicted under New York law of the offense of an attempted sale of a controlled substance. Based on that conviction, the Immigration and Naturalization Service ("INS") instituted deportation proceedings against him in 1994.

In 1995, Respondent sought the relief of waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c). Section 212(c) grants the Attorney General discretionary authority to admit otherwise excludable permanent resident aliens. Although the statute expressly authorizes only a waiver of exclusion, courts have interpreted it to authorize relief in deportation proceedings as well. *See Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976); *De Osorio v. INS*, 10 F.3d 1034, 1039 (4th Cir. 1993). The

Immigration Judge found that the respondent was eligible for that relief, but, in the exercise of discretion, denied his application. *See Matter of Soriano*, File No. A39 186 067 (Executive Office for Immigration Review ("EOIR"), Office of the Immigration Judge, Oct. 12, 1995). Respondent appealed from that decision on October 23, 1995.

On April 24, 1996, while Respondent's appeal was pending, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). Section 440(d) of AEDPA amended INA § 212(c). The amendment provides in relevant part that section 212(c) relief shall not be available to aliens who are deportable by reason of having committed certain specified criminal offenses. Respondent's offense is among those specified.[1] Thus, a threshold issue on appeal was whether the amendment to section 212(c) applied to foreclose Respondent's application for relief from deportation.[2]

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[1] The amendment provides in relevant part that section 212(c) relief shall not be available to an alien who "is deportable by reason of having committed any criminal offense covered in (INA) section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." 110 Stat. at 1277, as amended by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C., Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, 1996 U.S.C.C.A.N. Vol. 9B (110 Stat.) 1672. Respondent's offense is covered by sections 241(a)(2)(A)(iii) and (B) of the INA. *See* 8 U.S.C. § 1251.

[2] It is important to note as a threshold matter that deportation proceedings are civil actions, and, thus, the constitutional bars to retroactive application of penal legislation do not apply. *INS v.*

The BIA was unanimous in concluding that AEDPA § 440(d) was effective immediately upon enactment on April 24, 1996. The BIA was divided, however, as to whether AEDPA § 440(d) applied to applications for section 212(c) relief that were pending on the effective date of AEDPA. Six members of the BIA concluded that Congress did not intend that aliens who had applications pending on April 24, 1996, should be barred from seeking that relief. Accordingly, they found that Respondent continued to be eligible for waiver of inadmissibility.[3] Five members of the BIA dissented. They would have held that section 440(d) did apply to pending applications for section 212(c) relief. One member of the BIA concurred in part and dissented in part. That member agreed with the majority that AEDPA § 440(d) should not be applied to pending section 212(c) applications, but would also have declined to apply it to other cases, such as those of permanent resident aliens subject to an Order to Show Cause.

For the reasons stated below, I conclude that the amendment to INA § 212(c) made by AEDPA § 440(d)

Lopez-Mendoza, 468 U.S. 1032, 1038 (1984); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-95 (1952). Moreover, it is well settled that Congress may legislate to alter the immigration consequences of past criminal convictions or acts. *Lehman v. Carson*, 353 U.S. 685, 690 (1957); *Mulcahey v. Catalanotte*, 353 U.S. 692, 694 (1957).

[3] The majority agreed with the Immigration Judge's conclusions that Respondent's attempted criminal sale of cocaine, together with his three other drug-related felonies, required a demonstration of outstanding equities before he could receive a waiver of inadmissibility, and that Respondent had not made such a demonstration.

applies to proceedings such as Respondent's, in which an application for relief under section 212(c) was pending when AEDPA was signed into law.[4]

Analysis

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court sought to "reconcile two seemingly contradictory statements found in [the Court's] decisions concerning the effect of intervening changes in the law": that "'a court is to apply the law in effect at the time it renders its decision,'" and that "'[r]etroactivity is not favored in the law.'" *Id.* at 263-64 (citations omitted).

The Court set forth the method for analyzing the temporal reach of a statute:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not

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[4] By Order dated September 12, 1996, I granted the request for review and vacated the opinion of the BIA in Matter of Bartolome Jhonny Soriano (A39 186 067).

> govern absent clear congressional intent favoring such a result.

Id. at 280.

In the present case, nothing in the language of the newly enacted statute, AEDPA § 440(d), specifies either that it is to be applied in pending deportation proceedings, or that it is not to be. Thus, the next task is to determine whether the statute would be given retroactive effect if applied in pending deportation proceedings. In this regard, the Court observed that "[w]hile statutory retroactivity has long been disfavored, deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Id.* at 268. A statute does not operate retroactively "merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-70 (citation and footnote omitted).

Of particular relevance here, the Court suggested that changes in the law affecting prospective relief, as well as those affecting jurisdiction and procedure, are generally not to be considered "retroactive." Specifically, the Court said:

> Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive. Thus, in *American Steel Foundries v. Tri-City Central Trades Coun-*

> *cil*, 257 U.S. 184 (1921), we held that § 20 of the Clayton Act, enacted while the case was pending on appeal, governed the propriety of injunctive relief against labor picketing. In remanding the suit for application of the intervening statute, we observed that "relief by injunction operates *in futuro*," and that the plaintiff had no "vested right" in the decree entered by the trial court.

Id. at 273-74.

Similarly, the three separately concurring Justices (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in the judgment), emphasized that intervening law was typically applied to pending applications for prospective relief:

> Courts traditionally withhold requested injunctions that are not authorized by then-current law, even if they were authorized at the time suit commenced and at the time the primary conduct sought to be enjoined was first engaged in. The reason, which has nothing to do with whether it is possible to have a vested right to prospective relief, is that "[o]bviously, this form of relief operated only *in futuro*." Since the purpose of prospective relief is to affect the future rather than to remedy the past, the relevant time for judging its retroactivity is the very moment at which it is ordered.

Id. at 293 (citations omitted).

Both the majority and concurring Justices identified another set of intervening statutes—those that confer or eliminate jurisdiction—that do not operate retroactively merely because they are applied to conduct arising before the statute's enactment. Justice Scalia

explained the Court's "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction . . . by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." *Landgraf*, 511 U.S. 286, 292-93 (Scalia, J. concurring).[5]

In summary, under *Landgraf*, a new statute does not have retroactive effect if it does not impair rights a party possessed when he or she acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. More specifically, an intervening statute that either alters jurisdiction or affects prospective injunctive relief generally does not raise retroactivity concerns, and, thus, presumptively is to be applied in pending cases. As discussed below, the application of AEDPA § 440(d) to pending applications for section 212(c) relief does not impair a right, increase a liability, or impose new duties on criminal aliens. The consequences of Respondent's

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[5] The single dissenting Justice in *Landgraf* was of the opinion that the presumption against retroactive legislation, "which serves to protect settled expectations," and which "is grounded in a respect for vested rights," "need not be applied to remedial legislation . . . that does not proscribe any conduct that was previously legal." *Id.* at 296-97 (Blackmun, J., dissenting) (citing *Sampeyreac v. United States*, 32 U.S. (7 Pet.) 222, 238 (1833) ("Almost every law, by providing a new remedy, affects and operates upon causes of action existing at the time the law is passed") and *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir.) ("Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known."), *cert. denied*, 449 U.S. 905 (1980)).

conduct remain the same before and after the passage of AEDPA: criminal sanctions and deportation. AEDPA § [440(d)] is best understood as Congress's withdrawal of the Attorney General's authority to grant prospective relief. Thus, the statute alters both jurisdiction and the availability of future relief, and should be applied to pending applications for relief.[6]

The relief sought in a section 212(c) application, waiver of inadmissibility, is prospective in nature. A successful applicant for relief under section 212(c) will not, as a matter of the sovereign's discretion, be deported from the country, even though his or her past criminal convictions would otherwise lead to deportation. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("The deportation hearing looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may

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[6] One formulation articulated in *Landgraf* for determining whether a statute operates retroactively—"whether [it] attaches new legal consequences to events completed before its enactment" —could be interpreted as compelling the conclusion that AEDPA § [440(d)] should not be applied to pending applications for section 212(c) relief. *Id.* at 269-70. Because the statute eliminates eligibility for a previously available form of relief from the immigration consequences of a prior criminal conviction, it could be argued that it attaches new legal consequence to a prior event. Elimination of a form of relief in this context, however, is not the same as the attachment of new legal consequences in the sense that the Court meant in *Landgraf*. If it were, most cases in the three categories that the Court identified as not constituting retroactive application when applied to past events—statutes that alter jurisdiction, procedural rules, and statutes affecting the availability of prospective injunctive relief—would also have to be understood as attaching new legal consequences to prior events and, hence, constituting retroactive application.

shed light on the respondent's right to remain."); *De Osorio v. INS*, 10 F.3d at 1042 (holding that an amendment barring applications for waivers of deportations filed after the effective date of the amendment to 212(c) is not made retroactive merely because it applies to convictions for aggravated felonies before that time: "The past aggravated felony conviction is only the prerequisite for the prospective denial of discretionary relief. . . . Congress did not attach additional consequences, but merely withdrew a previously available form of discretionary relief.").

Moreover, Congress's modification of section 212(c) operates to eliminate the discretionary authority of the Attorney General to grant relief in certain cases, and, thus, its effect is to remove jurisdiction. As the Solicitor General argued in the brief of the United States to the Supreme Court in *INS v. Elramly*, 73 F.3d 220 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1260, and *vacated*, 117 S. Ct. 31 (1996), a case raising the issue whether AEDPA divested the Attorney General of authority to grant section 212(c) relief in pending cases, "[j]ust as new 'jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties,'" *Landgraf*, 511 U.S. at 274, section 212(c) speaks to the power of the Attorney General to waive deportation, not to any right of an alien to such relief." Supplemental Brief for the Petitioner at 18. The majority opinion in *Landgraf* explains the practice of applying new jurisdictional statutes to pending cases by the fact that "a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Id.* at 274 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). Here, in contrast to the cases cited by the

Court, there is no alternative tribunal to which the criminal alien may petition. Even assuming that the lack of an alternative tribunal would be relevant to retroactivity analysis where a substantive right is at stake, eligibility for a congressionally created form of purely discretionary relief from the immigration consequences of a prior criminal conviction cannot properly be characterized as a substantive right.[7]

The Third Circuit's discussion of the application of an earlier amendment to section 212(c) to make an applicant ineligible for relief based on a prior criminal conviction applies equally here:

> In this case, the consequences of petitioner's criminal conduct were clear at the time of that conduct and they remain unchanged today. He was subject to possible criminal sanctions and deportation. The only relevant change in the law relates to the permissible scope of the Attorney General's discretion to grant relief from one of those consequences. Like statutes altering the standards for injunctive relief, this change has only a prospective impact. It is not designed to remedy the past but only to affect petitioner's future status with respect to the legality of his presence in the United States. Like statutes constricting the jurisdiction of a

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[7] The concurring opinion further notes that while there may sometimes be an alternative forum, there is not always one, and even where there is, it may deny relief for some collateral reason such as a statute of limitations bar. "Our jurisdiction cases are explained, I think, by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." *Landgraf*, 511 U.S. at 293 (Scalia, J. concurring).

> judicial body, these changes speak only to the power of a public agency. . . . Given the facts that petitioner's pre-1987 conduct clearly subjected him to deportation as well as criminal sanctions, and that § 212(c), as it then existed, offered relief from the former only at the unfettered discretion of the Attorney General, petitioner does not, and could not, contend that his conduct was undertaken in reliance on the then current version of § 212(c).

Scheidemann v. INS, 83 F.3d 1517, 1523 (3rd Cir. 1996).

The Seventh Circuit has expressed a contrary view in *Reyes-Hernandez v. INS*, 89 F.3d 490 (7th Cir. 1996), at least with respect to a narrow category of cases. In that case the petitioner had conceded deportability before the enactment of AEDPA, when he was still eligible for section 212(c) relief. The court speculated that had the petitioner known that this relief would no longer be available to him, he might have contested deportability.

> Considering the fell consequences of deportation, especially in cases of exceptional hardship, which are precisely the cases in which an appeal to section 212(c) would have a chance of success, we think it unlikely that Congress intended to mousetrap aliens into conceding deportability by holding out to them the hope of relief under section 212(c) only to dash that hope after they had conceded deportability. No such ignoble intention appears in the statute. Its absence is determinative under *Landgraf* because to make the concession of deportability a bar to relief under section 212(c) would be to attach a new legal

> consequence to the concession, an event that occurred before the new law came into existence.

Id. at 492-93. The court held that section 440(d) of AEDPA does not apply to cases in which deportability was conceded before AEDPA became law, "provided that the applicant for discretionary relief would have had at least a colorable defense to deportability; for if not, he lost nothing by conceding deportability." *Id.* at 493.[8]

Amici curiae in the current case also emphasized the reliance aliens may have placed on the availability of section 212(c) relief. Amici argue that aliens may rely on the possibility of obtaining section 212(c) relief not only when deciding whether to contest deportability, but also when deciding whether to litigate their criminal liability or enter into a plea agreement. It is true that the majority opinion in *Landgraf* notes that "familiar considerations of fair notice, reasonable reliance, and settled expectations" are factors offering "sound guidance" in "hard cases." *Landgraf*, 511 U.S. at 270. However, the Court states expressly that a statute does not operate retroactively merely because it "upsets expectations based in prior law." *Landgraf*, 511 U.S. at 270.

In any event, it is difficult to see how the possibility of obtaining section 212(c) relief would affect an alien's decision whether to concede or contest deportability. First, the criteria for determining whether someone is

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[8] The Seventh Circuit has confirmed that *Reyes-Hernandez* applies only in cases where the petitioner conceded deportability and had a colorable defense to deportability. *Arevalo-Lopez v. INS*, No. 96-1754, 1997 WL 1898, at *2 (7th Cir., Jan. 3, 1997).

deportable as a criminal alien are specific and fixed, and the grounds for challenging deportability are quite narrow. *See Rabiu v. INS*, 41 F.3d 879, 881 (2d Cir. 1994) (record of conviction sufficient to overcome alien's challenge to deportability); *Ortega de Robles v. INS*, 58 F.3d 1355, 1358 (9th Cir. 1995) (criminal convictions may not be collaterally challenged in deportation proceeding as ground for contesting deportability). Second, an alien need not choose between contesting deportability and seeking section 212(c) relief; an alien may pursue both.

It seems more plausible that an alien may enter a plea bargain hoping to obtain relief from deportation, but even so, the alien could not have reasonably relied upon the availability of that relief. For the past forty years, the law has been settled that Congress may legislate to alter the immigration consequences of past criminal convictions or acts. Moreover, as the Supreme Court recently unanimously reaffirmed in the context of analyzing a similar provision conferring discretionary authority upon the Attorney General, "suspension of deportation [is]. . . 'an act of grace' which is accorded pursuant to her 'unfettered discretion' and is similar to 'a judge's power to suspend the execution of a sentence, or the President's to pardon a convict.'" *INS v. Yueh-Shaio Yang*, 117 S. Ct. 350, 352-53 (1996) (citations omitted). Therefore, a criminal alien could not reasonably rely on the availability of section 212(c) relief in determining whether to plead guilty to a criminal offense or in determining whether to concede deportability.

Accordingly, the application of AEDPA § 440(d) to section 212(c) applications pending before the EOIR

would not be retroactive. However, to eliminate even the remote possibility that an alien who had a colorable defense to deportability may have conceded deportability in reliance on the availability of section 212(c) relief, I direct the EOIR to reopen cases upon petition by an alien who conceded deportability before the effective date of AEDPA for the limited purpose of permitting him or her to contest deportability.

CONCLUSION

For the foregoing reasons, AEDPA § 440(d) should be applied to INA § 212(c) cases pending before the EOIR on the effective date of AEDPA. EOIR shall reopen cases upon petition by an alien who conceded deportability before April 24, 1996, the effective date of AEDPA, for the limited purpose of permitting the alien to contest deportability.

Date: February 21, 1997 /s/ JANET RENO
JANET RENO
Attorney General

Supreme Court, U.S.
FILED
DEC 21 1998
OFFICE OF THE CLERK

No. 98-836

In The

Supreme Court of the United States

October Term, 1998

IMMIGRATION AND NATURALIZATION SERVICE AND ROSANNE SONCHIK, DISTRICT DIRECTOR,

Petitioners,

v.

DANIEL MAGAÑA-PIZANO.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Respondent, a legal permanent resident for more than twenty years who is deportable based on a single misdemeanor drug offense, is being held in executive custody and has been ordered deported based on the Attorney General's retroactive application of a 1996 amendment to the Immigration and Nationality Act (INA). After exhausting administrative remedies, respondent filed both a habeas corpus action in district court and, alternatively, a petition for review directly in the court of appeals to challenge his final deportation order on constitutional and non-constitutional grounds. The court of appeals, finding that both its own and the district court's jurisdiction was repealed by new INA amendments, held that preclusion of all review violated the Constitution and that the district court retained jurisdiction under 28 U.S.C. 2241 over both claims. The question presented is:

1. Whether the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) repealed the jurisdiction of both the courts of appeals and the district courts over challenges to a deportation order raising claims of statutory construction and constitutional violation and, if so, whether AEDPA and IIRIRA violate the Suspension of Habeas Corpus Clause, Article III or the Due Process Clause of the Constitution.

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OPINIONS BELOW

Respondent adopts the petitioners' statement of the opinions below.

JURISDICTION

Respondent does not contest this Court's jurisdiction under 28 U.S.C. 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

In addition to the provisions referred to in the Petition for Certiorari and reprinted in the Petitioners' Appendix:

U.S. Constitution, Art. III:

"Section 1. The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . "

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, . . . to Controversies to which the United States shall be a Party. . . . "

U.S. Constitution, Amend. V:

"No person shall be . . . deprived of life, liberty, or property without due process of law;. . . . "

STATEMENT

The jurisdictional issue in this case is whether Congress has repealed *all* federal court jurisdiction to review statutory retroactivity and constitutional equal protection challenges to a final order of deportation and, if so, whether such repeal violates the Constitution. The underlying substantive issue, whether Section 440(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, 1277, retroactively eliminates statutory eligibility for discretionary relief or violates equal protection, is not presented in this case because the court of appeals remanded those issues to the district court.

This case squarely presents whether either the courts of appeals or the district courts have jurisdiction to hear respondent's claims. Respondent sought judicial review of his final order of deportation both by means of a petition for review directly in the court of appeals and by means of a habeas corpus petition in the district court. Pet. Br. 10; Pet. App. 5a. The court of appeals consolidated the two actions into a single case and resolved the jurisdiction of both courts. Pet. App. 5a. In that respect, as noted by the government (Pet. Br. 28-29), the procedural posture of this case differs from *Goncalves v. Reno*, 144 F.3d 110 (1st Cir.), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Nov. 18, 1998) (No. 98-835), because Goncalves filed only a habeas corpus action in district court, but not a petition for direct review in the court of appeals.

For the reasons stated below, *certiorari* should be denied. However, if the Court determines that review of the jurisdictional issue is warranted, respondent agrees

with the government that this case, unlike *Goncalves*, would allow the Court to "render a definitive holding regarding the jurisdiction of *both* the courts of appeals *and* the district courts. . . . " Pet. Br. 29 (emphasis original).

THE STATUTORY FRAMEWORK

1. *Relief from Deportation.* Under the INA, a legal permanent resident who becomes deportable based on a criminal conviction, like respondent in this case, has long been statutorily eligible to apply for discretionary relief if the two criteria set forth in 8 U.S.C. 1182(c) are satisfied. First, the legal permanent resident must have resided in the United States for seven consecutive years. Second, the legal permanent resident must not have been convicted of an "aggravated felony" and must not have served a term of imprisonment of five years or more. *See, e.g., Francis v. INS*, 532 F.2d 268 (2d Cir. 1976); Pet. Br. 3 n.2. Over half of the total number of applications for Section 1182(c) relief were granted during fiscal years 1989 through 1994.[1]

In 1996, before repealing Section 1182(c) altogether, Congress expanded the list of disqualifying convictions. Specifically, Section 440(d) of AEDPA mandated that aliens who committed some non-violent, non-aggravated offenses were no longer eligible for discretionary relief from deportation under 8 U.S.C. 1182(c), regardless of

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[1] *Mojica v. Reno*, 970 F. Supp. 130, 178 (E.D.N.Y. 1997) (citing U.S. DEP'T. OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, STATISTICAL SHEET 1 (Jan. 19, 1995)), *aff'd sub nom. Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998).

how long they have lived in the United States or how strong their ties are to this country.[2] The Board of Immigration Appeals (BIA) ruled *en banc* that Section 440(d) did not apply retroactively to applications pending when AEDPA was enacted. *In re Soriano*, Int. Dec. No. 3289 (BIA June 27, 1996) (Pet. App. 65a-97a). At the request of the INS, however, the Attorney General vacated the BIA's decision (Pet. App. 98a) and issued a nationally-applicable ruling that AEDPA's new restrictions apply to all Section 1182(c) requests. *Matter of Soriano*, Int. Dec. No. 3289 (AG Feb. 21, 1997) (Pet. App. 99a-112a).

Five months after AEDPA, Congress enacted IIRIRA. IIRIRA replaced Section 1182(c) altogether for immigration proceedings initiated on or after April 1, 1997. IIRIRA 309(a) & (c)(1), 110 Stat. 3009-625. Section 1182(c) remains in effect only for cases in which immigration proceedings were commenced *before* April 1, 1997. For all immigration cases initiated on or after April 1, 1997 – now called "removal proceedings" – IIRIRA enacted a successor form of relief called "cancellation of removal," 8 U.S.C. 1229b(a) (Supp. II 1996), with its own eligibility criteria and mandatory disqualifications.

Respondent was subjected to deportation based on a single misdemeanor conviction of being under the influence of controlled substances. Pet. App. 3a. That conviction did not constitute a disqualifying offense for Section 1182(c) relief before the statute was amended by AEDPA

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[2] AEDPA Section 440(d) added the following sentence to the end of Section 1182(c): "This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in [enumerated INA provisions]."

440(d), and it is not a disqualifying offense for relief under the new IIRIRA "cancellation of removal" provision.

2. *Judicial Review.* Before AEDPA and IIRIRA, judicial review of final orders of deportation and exclusion was governed by 8 U.S.C. 1105a. Section 1105a provided that any alien subject to a final order of deportation – regardless of the basis for the order – was entitled to obtain judicial review by a petition for review directly in the court of appeals, 8 U.S.C. 1105a(a), and under some circumstances, by habeas corpus proceedings in the district court. 8 U.S.C. 1105a(a)(10).[3] The INA habeas corpus provision supplemented the "sole and exclusive" direct review procedure, and the circuit courts disagreed about when an alien could invoke it. *See, e.g., Nakaranurack v. INS*, 68 F.3d 290 (9th Cir. 1995); *Williams v. INS*, 795 F.2d 738 (9th Cir. 1986); *United States ex rel. Marcello v. INS*, 634 F.2d 964 (5th Cir. 1981).

a. AEDPA repealed the former habeas corpus provision in Section 1105a(a)(10) and added a provision (the precursor to the IIRIRA provision at issue here) stating that a final deportation order based on certain criminal grounds "shall not be subject to review by any court." AEDPA 440(a), 110 Stat. 1276.[4] The Ninth Circuit and

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[3] Section 1105a(a)(10) provided that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings."

[4] Section 440(a) was codified at 8 U.S.C. 1105a(a)(10) and provided: "Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by [enumerated grounds of deportation] shall not be subject to review by any court."

other courts of appeals dismissed pending petitions for review under Section 440(a) on the ground that Congress had repealed their statutory jurisdiction to exercise direct circuit court review. *See Duldulao v. INS*, 90 F.3d 396 (9th Cir. 1996).[5] The circuit courts routinely found, however, that elimination of direct review did not foreclose all judicial review over deportation orders because the possibility of alternative avenues of review, including specifically habeas corpus, remained. *See Duldulao*, 90 F.3d at 400 n.4.[6]

b. IIRIRA further amended the INA's judicial review provisions. First, for administrative proceedings commenced on or after IIRIRA's effective date, April 1, 1997, it repealed Section 1105a and adopted a new permanent judicial review statute, Section 1252. The permanent provision and the various subsections cited by the government (with the arguable exception of subsection (g)) (*see* Pet. Br. 5-6), apply *only* to cases where the

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[5] *See also Mansour v. INS*, 123 F.3d 423 (6th Cir. 1997); *Turkhan v. INS*, 123 F.3d 487 (7th Cir. 1997); *Fernandez v. INS*, 113 F.3d 1151 (10th Cir. 1997); *Boston-Bollers v. INS*, 106 F.3d 352 (11th Cir. 1997); *Kolster v. INS*, 101 F.3d 785 (1st Cir. 1996); *Salazar-Haro v. INS*, 95 F.3d 309 (3d Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997); *Hincapie-Nieto v. INS*, 92 F.3d 27 (2d Cir. 1996).

[6] *See also Mansour*, 123 F.3d at 426; *Williams v. INS*, 114 F.3d 82, 83-84 (5th Cir. 1997); *Fernandez*, 113 F.3d at 1155; *Chow v. INS*, 113 F.3d 659, 668 (7th Cir. 1997); *Kolster*, 101 F.3d at 790; *Salazar-Haro*, 95 F.3d at 311; *Hincapie-Nieto*, 92 F.3d at 30-31.

immigration proceeding is initiated on or after April 1, 1997.[7] Second, for cases (like respondent's) initiated *before* April 1, 1997, IIRIRA enacted special "transitional" judicial review rules. IIRIRA 309(a), (c)(1) & (4), 110 Stat. 3009-625, 626. These transitional provisions amend the judicial review procedures in former Section 1105a and apply only to a defined set of "pipeline" deportation and exclusion cases.[8] Respondent's case is governed by these transitional rules. Pet. Br. 6.

Like AEDPA 440(a), both the permanent and transitional provisions of IIRIRA restrict review of final orders based on enumerated criminal grounds. The transitional rule, which governs here, provides that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in [enumerated INA sections]."

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[7] IIRIRA 309(a) & (c)(1), 110 Stat. 3009-625. In a different context, the applicability of Section 1252(g) to cases pending on April 1, 1997, is presented to this Court in *Reno v. AADC*, No. 97-1252 (argued Nov. 4, 1998). Section 1252(g) provides:

> (g) Exclusive Jurisdiction
>
> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

8 U.S.C. 1252(g) (Supp. II 1996).

[8] The transitional rules apply to cases initiated *before* April 1, 1997, if the BIA decision is issued *after* October 30, 1996. IIRIRA 309(c)(4), 110 Stat. 3009-626.

IIRIRA 309(c)(4)(G), 110 Stat. 3009-626.[9] The courts of appeals interpreted the transitional provision as they had the precursor provision in AEDPA 440(a) and held that it repealed their own jurisdiction to hear cases on direct review. But, as under AEDPA, the courts again noted that alternative grounds for seeking review, in particular in district court habeas corpus actions, were not foreclosed. *See, e.g., Lerma de Garcia v. INS*, 141 F.3d 215, 217 (5th Cir.), *reh'g en banc denied*, 159 F.3d 1358 (1998); *Turkhan v. INS*, 123 F.3d 487, 490 (7th Cir. 1997).

The petitioners' discussion of judicial review under AEDPA and IIRIRA (Pet. Br. 17-20), fails to mention the government's own interpretation of these various jurisdictional provisions, as advanced in the courts of appeals. First, under AEDPA 440(a), the INS affirmatively sought dismissal of circuit court review on the ground that the *circuit* courts no longer had jurisdiction, including in cases raising constitutional claims. *See Chow v. INS*, 113 F.3d 659, 663, 668 (7th Cir. 1997). In the First Circuit, the INS further stated that, notwithstanding AEDPA, it would assume that the *district courts* retained jurisdiction to review at least some claims in a habeas corpus proceeding.[10] Subsequently, under IIRIRA's transitional

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[9] The successor provision in the permanent IIRIRA statute appears at 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996). It provides:

> "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in [enumerated provisions]."

[10] *Goncalves v. Reno*, 144 F.3d 110, 115 (1st Cir. 1998) (noting that in an earlier AEDPA case "INS conceded . . . some form of

rules, the INS again sought dismissal of petitions for review in circuit court cases that raised both statutory and constitutional claims. In fact, the INS urged dismissal of the precise constitutional equal protection claim raised by the respondent in this case – a claim the government now contends *is* reviewable in the courts of appeals by means of a petition for review. *Compare* Pet. Br. 18-20 *with Goncalves v. Reno*, 144 F.3d 110, 118-19 (1st Cir. 1998) (noting that INS asserted neither claim was reviewable in any court).

The government also fails to note that when some immigrants sought *certiorari* review in this Court to challenge circuit court rulings denying direct review, the government opposed review by this Court on the basis, *inter alia*, that any claim to judicial review based on the Suspension Clause must await the filing of a habeas corpus petition.[11]

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habeas jurisdiction in the district court"). The INS did not specify what it believed was the proper statutory basis for habeas review in the district courts.

[11] Brief for the Respondent [INS] in Opposition at 23, *Katsoulis v. INS*, No. 97-379 (filed Nov. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 624 (1997) (opposing *certiorari* and arguing that any claim under Suspension Clause was not properly presented because petitioner "did not seek a writ of habeas corpus"); Brief for the [INS] in Opposition at 15, *Chamorro-Torres v. INS*, No. 96-985 (filed Jan. 1997), *cert. denied*, 520 U.S. 1103 (1997) (same); Brief for the [INS] in Opposition at 9, *Qasguargis v. INS*, No. 96-806 (filed Jan. 1997), *cert. denied*, 519 U.S. 1148 (1997) (same).

STATEMENT OF FACTS

1. Respondent Daniel Magaña-Pizano is a citizen of Mexico who has been a legal permanent resident of the United States for twenty-one years. Pet. App. 3a. He entered the United States legally as a five-year-old child with his parents and siblings. *Id.* In 1995, he pled guilty to a single misdemeanor offense of being under the influence of controlled substances. *Id.* At the time respondent pled guilty, he was eligible to apply for a discretionary waiver of deportation under 8 U.S.C. 1182(c).

On May 17, 1996, the INS commenced deportation proceedings based on the misdemeanor conviction. Pet. App. 3a. Respondent conceded deportability and applied for relief under Section 1182(c). Pet. App. 4a. The immigration judge (IJ) ruled that AEDPA 440(d) rendered respondent statutorily ineligible for Section 1182(c) relief. Pet. App. 5a. Respondent appealed to the BIA, which dismissed his appeal without exercising discretion, on the basis of the Attorney General's interpretation of Section 440(d) in *Matter of Soriano*. Pet. App. 5a. The BIA issued a final order of deportation, and respondent was taken into custody for deportation in May 1996, where he remains.

Respondent immediately filed a petition for writ of habeas corpus pursuant to 28 U.S.C. 2241. Respondent asserted that Section 440(d) violates equal protection and asked to amend the petition to allege that Section 440(d) did not apply retroactively to his case. Pet. Br. 9 & n.5. The district court dismissed the habeas corpus petition for lack of jurisdiction. Pet. App. 5a. Respondent appealed the habeas dismissal and also timely filed a petition for review directly in the court of appeals. Pet.

App. 5a. The Ninth Circuit consolidated respondent's appeal of the habeas dismissal with the petition for review.

In the court of appeals, respondent challenged AEDPA 440(d) on statutory retroactivity and constitutional equal protection grounds. He sought judicial review of both the statutory and constitutional claims in either the district court by means of his habeas corpus action under 28 U.S.C. 2241 or on direct review in the court of appeals by means of his petition for review. In support of district court jurisdiction, respondent asserted that, as a matter of statutory construction, neither AEDPA nor IIRIRA expressly mentioned or repealed the general grant of habeas corpus jurisdiction to the district courts in Section 2241, and that that grant of jurisdiction remained intact absent an express repeal under *Felker v. Turpin*, 518 U.S. 651 (1996).[12] Respondent also argued that his statutory and constitutional claims were encompassed

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[12] Both parties fully briefed the jurisdictional question of whether, as a matter of statutory construction, AEDPA or IIRIRA repealed district court habeas corpus jurisdiction under Section 2241, as *Hose v. INS*, 141 F.3d 932 (9th Cir. 1998), on which the court below subsequently relied in finding a repeal of Section 2241, was not decided until after the instant case was fully submitted. *See* Brief for Petitioner [Magaña-Pizano] at 15-16, *Magaña-Pizano v. INS*, 152 F.3d 1213 (9th Cir. 1998) (Nos. 97-15678 & 97-70384); Brief for Respondent [INS] at 12-14, *Magaña-Pizano v. INS*, 152 F.3d 1213 (9th Cir. 1998) (Nos. 97-15678 & 97-70384).

within the plain terms of 28 U.S.C. 2241(c)(1) & (3).[13] In support of his *constitutional* right to judicial review (in either the district court or the court of appeals), respondent asserted that the Suspension of Habeas Corpus Clause, Art. I, Sec. 9, Cl. 2, the separation of powers principle embodied in Article III, and the Due Process Clause of the Fifth Amendment entitled him to judicial review.

In response, the INS argued that *no* court had jurisdiction over either the constitutional or statutory claim. It argued that respondent's retroactivity claim could not be heard in either the district court in a habeas corpus action or in the court of appeal by petition for review. The INS further argued that the district court lacked jurisdiction over the equal protection claim, and contrary to the position taken here, that the court of appeals also lacked jurisdiction because direct review remained only for substantial constitutional claims causing a "fundamental miscarriage of justice." *See* Pet. App. 22a-23a.

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[13] 28 U.S.C. 2241 provides:

(c) The writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under or by color of the authority of the United States . . .
or

. . .

(3) He is in custody in violation of the Constitution or laws or treaties of the United States.

Looking first at its own direct review jurisdiction, the court of appeals found that the IIRIRA 309(c)(4)(G) transitional provision governed the petition for review (Pet. App. 6a-7a), that the provision barred respondent's claims (Pet. App. 7a-8a), and that under circuit precedent (interpreting AEDPA 440(a)), the court lacked jurisdiction because "Congress had [not] conferred it." Pet. App. 8a (citing *Duldulao v. INS*, 90 F.3d 396, 399-400 (9th Cir. 1996)).

Turning to the district court's habeas corpus jurisdiction, the court of appeals determined that it was bound by *Hose v. INS*, 141 F.3d 932 (9th Cir. 1998) (ruling that Section 1252(g) eliminated access to habeas corpus relief),[14] and posed the issue in this case as "whether [Section 1252(g)], as interpreted by *Hose* and applied to cases such as the one before us, violates the Suspension Clause . . . where no other avenue of judicial review exists." Pet. App. 11a-12a. After reviewing the history of habeas corpus in both the common law and immigration contexts, the court of appeals concluded that Section 1252(g) as construed by *Hose* violated the Suspension Clause in cases where no other avenue for review existed. Pet. App. 19a ("elimination of all judicial review of executive detention violates the Constitution"); *see also Henderson v. INS*, 157 F.3d 106, 120 (2d Cir. 1998) ("for at least a hundred years, the courts have reviewed the executive branch's interpretation of the immigration laws, and have

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[14] As discussed below, the Ninth Circuit has, since the filing of the government's petition, granted rehearing *en banc* and withdrawn the panel opinion in *Hose v. INS*, No. 97-15789, 1998 Daily Journal D.A.R. 12215 (9th Cir. Dec. 2, 1998).

deemed such review to be constitutionally mandated"), *petition for cert. filed sub nom. Reno v. Navas*, ___ U.S.L.W. ___ (U.S. Dec. 18, 1998) (No. 98-___).

Having ruled that Section 1252(g) could not constitutionally block access to habeas corpus, the court of appeals concluded that "to the extent habeas remedies in immigration cases are protected by the Suspension Clause, relief is afforded through the statutory remedy of 28 U.S.C. § 2241." Pet. App. 21a. It then ruled that respondent's constitutional and statutory claims fell within the scope of Section 2241 and remanded the case to the district court for a decision on the merits. Pet. App. 24a.

REASONS FOR DENYING THE WRIT

For the reasons set forth in Point 1, *infra*, *certiorari* should be denied. For the reasons set forth in Point 2, *infra*, if review is granted, respondent agrees with the government that this case (along with Magana-Pizano's conditional cross-petition), rather than *Goncalves*, presents the proper vehicle for addressing the *jurisdictional* issues because the respondent in this case filed both a district court habeas action *and* a petition for review in the court of appeals.

1. Review is not warranted because the Ninth Circuit has withdrawn its prior decision in *Hose v. INS* that resulted in the constitutional ruling in the decision below,

because no conflict exists among the circuits on the jurisdictional (or merits) question, because the jurisdictional issue arises from interim statutory provisions that apply only to transitional cases governed by expiring jurisdictional statutes, and because the decision is correct. The instant setting, involving temporary INA provisions that are so unclear that the government itself has interpreted them inconsistently, is not an appropriate vehicle for the Court to consider the far-reaching constitutional questions about the scope of Congress's power to limit judicial review of executive detention that would arise if Congress has repealed all grants of jurisdiction, including Section 2241.

a. There is no conflict among the circuit courts on either of the two jurisdictional questions the government presents: whether respondent may obtain judicial review of his retroactivity and equal protection claims (Pet. Br. I-II), and, if so, whether the district court or the court of appeals is the proper forum to raise those claims. *See* Pet. Br. 21-24. Three courts of appeals, the First, Second and Ninth, have squarely addressed both questions and agree that judicial review of both the statutory and constitutional claims is available and that the proper forum is the district court pursuant to 28 U.S.C. 2241. *See* Pet. App. 1a-24a; *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998). Six additional courts of appeals are now considering habeas corpus appeals that raise the same jurisdictional (and merits) claims presented by this case.[15] Consideration by

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[15] *LaGuerre v. INS*, No. 98-1954 and *Avelar-Cruz v. Reno*, No. 98-2613 (7th Cir.) (argued & submitted Oct. 29, 1998); *Gutierrez-*

this Court is premature unless and until an actual conflict between the circuits emerges. *Cf. Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923).[16]

The government contends that there is a conflict in the lower courts because the Seventh Circuit in *Yang v. INS*, 109 F.3d 1185 (7th Cir.), *cert. denied sub nom. Katsoulis v. INS*, ___ U.S. ___, 118 S. Ct. 624 (1997), has "disagreed with the proposition that aliens may proceed under Section 2241. . . . " Pet. Br. 27. Yet the government does not, and could not, maintain that *Yang held* that Section 2241 is no longer available for aliens such as the respondent in

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Martinez v. INS, No. 98-8185 and *Mayers v. Reno*, No. 97-5537 (11th Cir.) (argued & submitted Oct. 8, 1998); *Sandoval v. Reno*, No. 98-1099 (3d Cir.) (argued & submitted Sept. 28, 1998); *Shah v. Reno*, No. 98-2636 (8th Cir.) (argument scheduled Jan. 13, 1998); *Jurado-Gutierrez v. Greene*, No. 97-1437 (10th Cir.); *Pak v. Reno*, No. 98-3852 (6th Cir.).

[16] Although the First, Second and Ninth Circuits are the only courts of appeals to decide both the proper *forum* and the *scope* of review available to aliens with criminal convictions, other circuits have addressed the forum question and have rejected the government's position that all review under AEDPA and IIRIRA's transitional rules belongs in the courts of appeals. These courts stated or assumed that habeas corpus jurisdiction (or another avenue) remains available, and invited or instructed immigrants to seek review through such an action. *See, e.g., Lerma de Garcia v. INS*, 141 F.3d 215, 217 (5th Cir.) (rejecting government's position that aliens with criminal convictions can obtain review in courts of appeals and noting that "criminal deportees retain some opportunity to apply for writs of habeas corpus"), *reh'g en banc denied*, 159 F.3d 1358 (1998); *Turkhan v. INS*, 123 F.3d 487, 490 (7th Cir. 1997) (rejecting government's position that aliens with criminal convictions can seek review in courts of appeals and noting "possibility of a writ of habeas corpus").

this case; indeed, *Yang* was decided before IIRIRA took effect on April 1, 1997, and the alien was before the Seventh Circuit solely on a petition for review and had not filed a habeas petition. More importantly, the statements in *Yang* regarding the availability of Section 2241 have been superseded by subsequent decisions in the Seventh Circuit. Those decisions have rejected the government's position that the courts of appeals are the proper forum to seek review for aliens such as respondent, and in doing so, have specifically retreated from the *dicta* in *Yang* that suggested that Section 2241 is no longer available. *See Turkhan v. INS*, 123 F.3d 487, 490 (7th Cir. 1997) (noting "possibility of a writ of habeas corpus authorized under . . . [Section] 2241"); *Chow v. INS*, 113 F.3d 659, 668 (7th Cir. 1997) (same); *see also* Pet. Br. 27 (acknowledging the Seventh Circuit's subsequent *Turkhan* decision). Indeed, the precise jurisdictional question raised in the instant case remains pending in the Seventh Circuit. *See LaGuerre v. INS*, No. 98-1954 and *Avelar-Cruz v. Reno*, No. 98-2613 (7th Cir.) (argued and submitted Oct. 29, 1998) (appeals from habeas actions under Section 2241 challenging AEDPA 440(d) on retroactivity and equal protection grounds).

The government has also argued in the circuit courts that the Eleventh Circuit's recent decision in *Richardson v. Reno*, No. 98-4320, ___ F.3d ___, 1998 WL 850045 (11th Cir. Dec. 9, 1998), decided after the filing of the government's petition in this case, creates a split in the circuits because *Richardson* states in *dicta* that IIRIRA repealed Section 2241, and that review of final orders is available only in the court of appeals and only to the extent guaranteed by the Suspension Clause. *Richardson*, however, did not

involve an alien seeking judicial review of a final order of deportation. Indeed, Richardson's administrative proceeding remains pending in the BIA (*id.* at *3), and the litigation before the Eleventh Circuit concerned only his right to release from detention on bond pending the outcome of his removal proceeding. *See id.* at *2-*4. The Eleventh Circuit's discussion regarding the availability of Section 2241 to review *final orders* of deportation is therefore *entirely dicta*. The jurisdictional questions in the instant case regarding review of final orders remain pending in the Eleventh Circuit. *See Gutierrez-Martinez v. INS*, No. 98-8185 and *Mayers v. Reno*, No. 97-5537 (11th Cir.) (argued & submitted Oct. 8, 1998).

In short, there is no conflict in the circuit courts. All three circuits that have ruled in cases squarely presenting the jurisdictional issue raised by the government's petition in this case – the First, Second, and Ninth – have held that a statutory retroactivity and constitutional equal protection challenge to the Attorney General's decision in *Soriano* is properly litigated in a district court habeas action under Section 2241.

b. This case does not raise questions of lasting national importance warranting this Court's review because it arises under IIRIRA's *temporary* "transitional" judicial review rules and does not involve the *permanent* judicial review provisions of IIRIRA. The government attempts to cloud the temporary nature of the issue by arguing that the permanent counterpart to the applicable transitional provision, 8 U.S.C. 1252(a)(2)(C), "is substantively *identical*" and that the "courts in the future are *likely* to construe" (Pet. Br. 16 n.9) (emphasis added) the permanent provision in light of their interpretation of the

transitional rule. But elsewhere the INS has already argued that decisions construing the transitional provision of IIRIRA 309(c)(4)(G) do *not* govern cases under the permanent successor provision, 8 U.S.C. 1252(a)(2)(C).[17]

The fact that this case (like *Goncalves*, No. 98-835) involves only IIRIRA's transitional provisions strongly militates in favor of denying *certiorari*. If the Court were to find that Section 2241 remains available under IIRIRA's transitional rules, the Court's ruling would not eliminate the inevitable future litigation that will arise under IIRIRA's permanent provisions, unless the government were to definitively agree that interpretation of IIRIRA's transitional provisions conclusively settles the interpretation of IIRIRA's permanent provisions. Alternatively, if the Court were to find that the transitional rules did repeal 28 U.S.C. 2241 as well as all other statutory grants of jurisdiction over respondent's non-constitutional retroactivity claim, then the Court would have to decide historic constitutional questions regarding the reach of Congress's power to eliminate Article III review for individuals in executive detention in the context of an *interim* jurisdictional provision. If the Court is going to reach those far-reaching constitutional questions, it should not do so unless the *permanent* provisions are found to have repealed all statutory grants of jurisdiction, including Section 2241.

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[17] *See, e.g.*, Brief for Respondent-Appellee [INS] at 17-18 n.10, *Esparza-Treto v. Greene*, No. 98-1339 (10th Cir.) (filed Nov. 20, 1998) (*Magaña-Pizano* is "clearly limited to cases under the transitional rules and does not apply to cases under new Section 242.").

c. The court of appeals held that respondent's claims were reviewable in a district court habeas corpus action under 28 U.S.C. 2241. That ruling is correct both as a matter of statutory interpretation under the clear statement rule of *Felker v. Turpin*, 518 U.S. 651 (1996), and as a matter of constitutional right.[18]

As the First and Second Circuits have correctly recognized, the 1996 amendments to the INA do not repeal

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[18] The court below, unlike the First and Second Circuits, held that Section 2241 had been repealed, but ruled that the 1996 amendments were unconstitutional insofar as they left respondent without any judicial forum to raise his claims. Pet. App. 19a; *Hose v. INS*, 141 F.3d 932, 935 (9th Cir. 1998), *reh'g en banc granted & opinion withdrawn*, 1998 Daily Journal D.A.R. 12215 (9th Cir. Dec. 2, 1998). Accordingly, it held that Section 2241 must remain available for aliens, like respondent, who are subject to a bar on review in the courts of appeals. Pet. App. 20a-21a.

The court ruled on constitutional grounds only because it believed itself constrained by the Ninth Circuit's *now-withdrawn* opinion in *Hose*. *See* Pet. App. 18a. *Hose* involved an alien whose removal order was *not* based on a criminal conviction and who therefore did not face a bar on direct review in the court of appeals. *Hose*, 141 F.3d at 933. In that non-criminal context, *Hose* stated, in broad *dicta*, that IIRIRA repealed Section 2241 and made no exception for aliens who could not obtain review in the court of appeals. *Id.* at 935. Because the court below believed that it was bound by *Hose* on the question whether Section 2241 has been repealed, it proceeded to the constitutional questions raised by a total preclusion of review. Pet. App. 18a. *Hose* has now been withdrawn and the Ninth Circuit has granted rehearing *en banc* in that case, with argument scheduled for March 25, 1999. *See Hose v. INS*, No. 97-15789, 1998 Daily Journal D.A.R. 12215 (9th Cir. Dec. 2, 1998). The Ninth Circuit itself may therefore now conclude that Section 2241 has not been repealed (at least for aliens with criminal convictions).

Section 2241 because neither AEDPA's nor IIRIRA's provisions expressly mention Section 2241, much less contain the requisite express and unambiguous directive necessary to repeal that venerable statute. *Felker*, 518 U.S. at 661 (Section 2241 may not be repealed "by implication"); *see also Goncalves*, 144 F.3d at 122; *Henderson*, 157 F.3d at 119 (discussing holding of *Jean-Baptiste v. Reno*, 144 F.3d 212 (2d Cir. 1998)).[19]

The clear statement rule of *Felker* is not a formalistic requirement. It acts as a "signpost[ ], warning Congress that specific types of legislation, such as acts that . . . strip the courts of all jurisdiction, may give rise to constitutional difficulties." *Lee v. Reno*, 15 F. Supp. 2d 26, 38 (D.D.C. 1998).

The fact that AEDPA and IIRIRA are not sufficiently explicit to effectuate a repeal of Section 2241 is underscored by the government's own shifting interpretation of these transitional statutes. Indeed, in one circuit the INS stated that it would assume that any review that remained would occur in a *district court* habeas corpus petition. *Goncalves*, 144 F.3d at 115 (noting that in a prior AEDPA case "INS conceded . . . some form of habeas

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[19] The enactment of 8 U.S.C. 1105a in 1961 did not repeal Section 2241 expressly or by implication, and the amendments made by AEDPA and IIRIRA do not even mention Section 2241. New Section 1252(g), on which the government places special emphasis, also fails the *Felker* test because it does not expressly amend or mention Section 2241 even though it was enacted *after* this Court's unanimous and closely-watched *Felker* opinion removed any possible doubt that Congress knew of the necessity for explicit legislation to amend or repeal jurisdiction under Section 2241. *See Goncalves*, 144 F.3d at 122.

jurisdiction in the district court"). Moreover, INS sought dismissal in the circuits of the same claim it now insists is reviewable only in the courts of appeals (respondent's equal protection claim), and has argued in the past that any claim for review under the Suspension Clause had to await the filing of a habeas corpus petition. *See* note 11, *supra*. Now, the government abandons those earlier views and argues that IIRIRA's transitional provisions are clear and unambiguous and that the Court must therefore decide the far-reaching constitutional questions raised by a total preclusion of all Article III review over respondent's retroactivity claim.

The government contends that the court of appeals created "needless constitutional doubt" (Pet. Br. 16), and asserts, without explanation, that Section 309(c)(4)(G) could have been construed to allow jurisdiction over constitutional claims directly in the court of appeals by a petition for review. Pet. Br. 19-20. But even if construing Section 309(c)(4)(G) to allow review of *constitutional* claims were possible, doing so does not avoid the constitutional questions raised by the jurisdictional provisions of AEDPA and IIRIRA's transitional rules. The constitutional question remains whether judicial review of respondent's *non-constitutional* question of statutory interpretation (*i.e.*, whether the statute applies retroactively) can be barred. Construing IIRIRA to allow review of only constitutional claims does nothing to avoid that constitutional question.

Finally, even if Section 2241 has been repealed, the court of appeals properly recognized that respondent's claims are reviewable as a matter of constitutional right.

The constitutional basis for judicial review of respondent's statutory retroactivity and constitutional equal protection claims lies in the Suspension Clause, the Separation of Powers principle of Article III and the Due Process Clause of the Fifth Amendment. The government asserts that denying review of a statutory claim governing discretionary relief raises no constitutional issue. Pet. Br. 20-21. That is contradicted by decades of consistent judicial adjudication of such claims in habeas corpus proceedings, including by this Court. Under the immigration acts of 1891 and 1917, judicial review was prohibited except as "required by the Constitution." *Heikkila v. Barber*, 345 U.S. 229, 235 (1953). Throughout that period, however, the courts adjudicated habeas petitions by resident aliens alleging that a denial of discretionary relief was erroneous because it rested on a misconstruction of the immigration statute or some other non-constitutional error.

This Court twice reviewed the denial of discretionary deportation relief for *non-constitutional* error shortly after the Court affirmed in *Heikkila* that review was limited to the constitutional core. *See United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). *Accardi* is especially significant because the Court exercised habeas jurisdiction and overturned the denial of discretionary relief over the specific objection of four dissenting Justices that habeas corpus jurisdiction did not extend to

claims arising from discretionary relief. *See Accardi*, 347 U.S. at 269 (Jackson, J., dissenting).[20]

The government has not pointed to a single habeas decision of this Court holding that review of a legal error concerning eligibility for discretionary relief from deportation can be insulated from all Article III review, including habeas corpus review. Absent an adequate and effective alternative avenue of review, the Suspension Clause requires review of both statutory and constitutional claims challenging eligibility to apply for relief from deportation. *See Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring) ("[T]he traditional Great Writ was largely a remedy against executive detention"); *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.").

Judicial review of the legal claim presented here is also grounded in Article III. *See Commodities Future Trading Comm'n v. Schor*, 478 U.S. 833 (1986). Under Article III, respondent's legal claim cannot be adjudicated entirely by the Executive Branch without any access, by appeal or otherwise, to an Article III court. Likewise, the Due Process Clause requires access to a *judicial* forum to present respondent's statutory claim because deportation of a long-time legal resident implicates fundamental interests

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[20] The courts of appeals routinely reviewed claims denying discretionary relief during this period. *See, e.g., Mastrapasqua v. Shaughnessy*, 180 F.2d 999 (2d Cir. 1950) (Frank, J.); *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489 (2d Cir. 1950) (L. Hand, J.).

"basic to human liberty and happiness." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950).

2. If the Court decides that review is warranted, respondent agrees in part, and disagrees in part, with the government's suggestion regarding which case(s) should be taken to ensure that there are no procedural obstacles to a complete resolution of the issues. First, respondent agrees with the government that the instant case is a better vehicle to address the *jurisdictional* issue than *Goncalves*. Unlike Goncalves, who filed only a district court habeas action, Magaña-Pizano filed *both* a district court habeas corpus action and a court of appeals petition for direct review. As the government notes, *Magaña-Pizano* is therefore the appropriate vehicle to address the jurisdictional issues because it "would allow this Court to render a definitive holding regarding the jurisdiction of *both* the courts of appeals *and* the district courts. . . . " Pet. Br. 29 (emphasis in original). In that respect, in order to ensure that the question of the court of appeal's jurisdiction is fully before the Court, respondent in this case is filing a conditional cross-petition seeking *certiorari* of the Ninth Circuit's dismissal of Magaña-Pizano's petition for review.[21]

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[21] The government has requested that the Court take both *Goncalves* (because only that case presents the merits) and *Magaña-Pizano* (because it presents the jurisdictional issues in the most comprehensive manner). Pet. Br. 28-29. Alternatively, the government suggests that if the Court takes only one case, it should take *Goncalves*, because *Magaña-Pizano* does not present the merits issue. However, the government would presumably agree with respondent that if the Court grants *certiorari* on *only* the *jurisdictional* issue, it should take *Magaña-Pizano*, and need

Second, respondent disagrees with the government that *Goncalves* presents an appropriate vehicle to address the *merits* issues. The government's own reasoning shows that it would make little sense for the Court to grant *certiorari* in *Goncalves* in order to address the retroactivity of Section 440(d). *Goncalves* will allow the Court to reach the merits issue *only* if the Court concludes that jurisdiction is proper *in a district court habeas action*. *See* Pet. Br. 29 (review of *Goncalves* will "preserv[e] the Court's ability to resolve [the merits issue] *if it concludes that the district court* in *Goncalves*" had jurisdiction) (emphasis added). But, if the Court were to conclude that jurisdiction over the retroactivity claim lies in the courts of appeals, then the merits issue will not be presented because Goncalves filed only a district court habeas action. Accordingly, the retroactivity issue should be considered, if at all, after the Court has determined whether, and where, jurisdiction is proper, or in a case where the alien filed both a habeas corpus action and a petition for direct circuit court review.

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not also take *Goncalves*, since *Goncalves* adds nothing to *Magaña-Pizano* on the jurisdictional issue.

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1998

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
PETITIONERS

v.

DANIEL MAGANA-PIZANO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-836

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

DANIEL MAGANA-PIZANO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

1. The Ninth Circuit has held unconstitutional 8 U.S.C. 1252(g) (Supp. II 1996), as applied to criminal aliens who are subject to the preclusion-of-review provisions of Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276, and Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-626. As we explain in the certiorari petition (at 14-16), a decision holding an Act of Congress unconstitutional warrants review by this Court. Respondent essentially ignores that compelling basis for review by this Court.

2. Respondent argues (Br. in Opp. 14-17) that there is no conflict among the circuits on the jurisdictional issue decided by the court of appeals—namely, that a district court may exercise jurisdiction under the general federal habeas corpus statute, 28 U.S.C. 2241, to review a criminal alien's claims (a) that the Attorney General erroneously determined that Section 440(d) of AEDPA, 110 Stat. 1277, applies in pending deportation

cases to bar discretionary relief from deportation under 8 U.S.C. 1182(c) (1994) to certain classes of criminal aliens, and (b) that, so construed by the Attorney General, Section 1182(c) violates constitutional equal-protection principles as applied to his case, because it denies eligibility for discretionary relief from deportation to criminal aliens placed in deportation proceedings in the United States, but not those seeking admission when returning from abroad. Recently, however, two courts of appeals have disagreed with the Ninth Circuit's ruling in this case and have held that Congress permissibly precluded access to the district courts in immigration cases under Section 2241.

In *LaGuerre* v. *Reno*, No. 98-1954 (Dec. 22, 1998), which (as respondent notes, Br. in Opp. 15 n.15), raises the same jurisdiction and merits issues as those presented here, the Seventh Circuit rejected the Ninth Circuit's decision in this case. The Seventh Circuit held that the district courts may not exercise jurisdiction under Section 2241 over claims such as those raised by respondent in this case. The Seventh Circuit concluded that, in Section 440(a) of AEDPA, 110 Stat. 1276, Congress had precluded the covered classes of criminal aliens' access to the district courts by habeas corpus under 28 U.S.C. 2241. *LaGuerre*, slip op. 7 ("We conclude that for the class of aliens encompassed by section 440(d), judicial review by means of habeas corpus did not survive the enactment of that section."). The court further held that this preclusion of district court jurisdiction does not violate the Suspension of Habeas Corpus Clause, U.S. Const., Art. I, § 9, Cl. 2. It first expressed "doubt that the suspension clause requires preserving habeas corpus as a vehicle for challenging final orders of deportation in cases in which the jurisdiction of the immigration authorities over the alien is

not in question." *LaGuerre*, slip op. 4. It then suggested that judicial review for aliens covered by Section 440(d) of AEDPA has not been "totally extinguished," *id.* at 7, because aliens may be able, on petition for review of a deportation order filed directly in the court of appeals, to "challenge their deportation on constitutional grounds," *id.* at 9. The court expressed assurance that, under the regime established by Congress requiring that all challenges to deportation orders be heard, if at all, in the courts of appeals, "the layering of judicial review proposed by [the aliens] is avoided, judicial review is curtailed as Congress intended, but enough of a safety valve is left to enable judicial correction of bizarre miscarriages of justice." *Id.* at 8.[1]

Similarly, in *Richardson* v. *Reno*, No. 98-4230, 1998 WL 889376 (Dec. 22, 1998), the Eleventh Circuit concluded that Congress "strip[ped] all jurisdiction,

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[1] The Seventh Circuit noted that the purpose of Congress's 1996 amendments to the immigration laws precluding review of criminal aliens' challenges to their deportation orders "was to curtail and speed up judicial review of deportation orders directed against disfavored classes of criminals, such as drug offenders." *LaGuerre*, slip op. 6. But "[i]f the effect of the new provision was * * * to shift judicial review to the district court, followed of course by appeal to this court, then Congress *enlarged* judicial review for these deportees (and for no others![])." *Ibid.* (emphasis added); see *id.* at 7 (noting that, if the courts that have held to the contrary are right, then "Congress accomplished nothing toward its aim of curtailing judicial review," and "[m]aybe less than nothing, if by closing the door to review by the courts of appeals Congress simultaneously opened the door to review by the district courts *followed by* review by the courts of appeals"). See also *Henderson* v. *INS*, 157 F.3d 106, 119 n.9 (2d Cir. 1998) (finding itself bound by precedent to agree with decision below, but acknowledging that "review in the courts of appeals seems more consistent with congressional intent"), petition for cert. pending *sub nom. Reno* v. *Navas*, No. 98-996 (filed Dec. 17, 1998).

including § 2241 habeas, from the district courts." *Id.* at *4. The Eleventh Circuit emphasized (*id.* at *13) that 8 U.S.C. 1252(g) (Supp. II 1996) provides that, notwithstanding "any other provision of law, no court shall have jurisdiction" to review the decision of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders under the Immigration and Nationality Act (INA). As the Eleventh Circuit explained, Section 1252(g)'s "broad admonition that it applies 'notwithstanding any other provision of law' sufficiently and clearly encompasses other provisions of law, such as § 2241. When Congress says 'any,' it means 'any' law, which necessarily includes § 2241." *Richardson*, 1998 WL 889376, at *13. Moreover, the Eleventh Circuit concluded, this preclusion of review in the district courts presents no constitutional difficulty under the Suspension of Habeas Corpus Clause. *Id.* at * 28-*29. It noted that the courts of appeals still retain, on petition for review of a removal order, authority to "determine that the removal order: (1) is against an alien (2) who is removable (3) by reason of having committed a criminal offense covered in certain enumerated sections," and also the authority to "entertain a constitutional attack" upon the INA itself. See *id.* at *29 (internal quotation marks omitted).[2]

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[2] Respondent argues (Br. in Opp. 17-18) that *Richardson* does not conflict with the decision below because it did not involve judicial review of a final order of deportation. The ruling in *Richardson*, however, was *broader* in scope than the context of review of final deportation orders, and necessarily encompassed the conclusion that the district courts lack jurisdiction under 28 U.S.C. 2241 to entertain challenges to final orders of deportation. See *Richardson*, 1998 WL 889376, at *13 ("Accordingly, we conclude that [Section 1252(g)] repeals any statutory jurisdiction over immigration decisions other than that conferred by [Section 1252]. That repeal includes § 2241 habeas jurisdiction over immigration decisions by

3. Respondent suggests (Br. in Opp. 18-19) that this case is of limited importance because it concerns only the transitional jurisdictional rules of AEDPA and IIRIRA. That is incorrect. Although the decision below construed a transitional provision of IIRIRA, Section 309(c)(4)(G), to preclude review of all of respondents' claims raised in his petition for review (see Pet. App. 30a-31a), the court followed decisions construing the similar Section 440(a) of AEDPA (see Pet. 16-17 n.9), and there is little reason to doubt that the court will do likewise in construing the substantively similar permanent replacement, 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996).[3] Moreover, that construction will not be affected by the court of appeals' recent grant of rehearing en banc in *Hose* v. *INS*, 141 F.3d 932 (9th Cir. 1998), withdrawn, No. 97-15789 (Dec. 2, 1998), because *Hose* does not involve a criminal alien covered by either Section 440(a) of AEDPA or Section 309(c)(4)(G) of IIRIRA.

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the Attorney General under the INA."). Indeed, as discussed in the text, the court specifically considered and rejected Richardson's contention that, if Section 1252(g) precluded district court habeas jurisdiction over immigration decisions under 28 U.S.C. 2241, then it would violate the Constitution because he would have no opportunity for judicial review of his final order of deportation. See 1998 WL 889376, at *28-*29.

[3] The court of appeals did note (Pet. App. 30a n.3) that the permanent jurisdictional changes made by IIRIRA in Section 1252(a)(2)(C) were not before it, and on that basis the INS has argued (in order to preserve its jurisdictional position) that courts are not obligated to extend the decision below to cases arising under IIRIRA's permanent jurisdictional provisions, especially in other circuits (see Br. in Opp. 19 n.17). The rationale for the decision below, however, suggests the Ninth Circuit will follow and extend it when construing Section 1252(a)(2)(C).

Accordingly, whatever the outcome of the rehearing en banc in *Hose*, it is likely that, in the future, courts in the Ninth Circuit will conclude one of two things. They may conclude—as the panel below concluded in this case—that all direct review in the court of appeals is precluded for criminal aliens like respondent, that review in the district courts under 28 U.S.C. 2241 is precluded for the same aliens by Section 1252(g) (which is applicable to IIRIRA's permanent review provisions), and that the resulting total preclusion of review violates the Suspension of Habeas Corpus Clause, requiring recourse to Section 2241 as a remedy. Alternatively, they may conclude—as the First Circuit concluded in *Goncalves* v. *Reno*, 144 F.3d 110 (1998), petition for cert. pending, No. 98-835, and the Second Circuit concluded in *Henderson* v. *INS*, 157 F.3d 106 (1998), petition for cert. pending *sub nom. Reno* v. *Navas*, No. 98-996—that Section 1252(g) does not preclude the district court from reviewing deportation orders under 28 U.S.C. 2241. Either decision would leave the district courts free to review orders of deportation, and either would be wrong, as we have explained in our petitions in this case, in *Goncalves*, and in *Navas*.[4]

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[4] Respondent contends (Br. in Opp. 9) that the position advanced in our petition, that a criminal alien covered by the jurisdiction-limiting and preclusion-of-review provisions of AEDPA and IIRIRA may nonetheless raise constitutional challenges to provisions of the INA affecting his deportation order on a petition for review in the court of appeals, is inconsistent with the government's position in *Chow* v. *INS*, 113 F.3d 659 (7th Cir. 1997), where the government moved for dismissal of the petition for review, and in *Goncalves*. *Chow*, however, involved only non-constitutional challenges to the alien's deportation order. See *id.* at 662. After AEDPA was enacted, Chow argued that its withdrawal of the court of appeals' jurisdiction over his petition for review was itself

4. Respondent defends the court of appeals' conclusion by arguing that Section 2241 was not repealed by implication in AEDPA (Br. in Opp. 20-22). The court of appeals, however, did not agree with respondent's position that AEDPA had no effect on Section 2241. To the contrary, it concluded (Pet. App. 20a) that Section 1252(g) had indeed "forfended access to relief under 28 U.S.C. § 2241 in immigration cases" (although it found that result to be unconstitutional). The First and Second Circuits have concluded that Section 1252(g) did not preclude access to the district courts under 28 U.S.C. 2241, as respondent notes (Br. in Opp. 20-21). But as the Eleventh Circuit observed, that reading is not faithful to the plain language of Section 1252(g). That Section "states comprehensively that '[e]xcept as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction' over the specified claims. * * * Congress could hardly have chosen broader language to convey its intent to repeal any and all jurisdiction except that provided by" the

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unconstitutional, see *id.* at 668, but that is not a "constitutional claim[]" raised against the deportation order itself (see Br. in Opp. 8). In *Goncalves*, the alien did not file a petition for review in the court of appeals; he filed only a habeas corpus petition in district court. The First Circuit had previously held in *Kolster* v. *INS*, 101 F.3d 785 (1st Cir. 1996) that Section 440(a) of AEDPA precluded it from exercising jurisdiction over petitions for review filed by criminal aliens covered by that Section, but that case also involved only non-constitutional challenges to a deportation order. Similarly, the fact that we opposed certiorari in cases in which the courts of appeals dismissed petitions for direct review, where the aliens had not filed habeas corpus petitions and the courts of appeals had therefore not comprehensively addressed the issue of habeas corpus jurisdiction (see Br. in Opp. 9 & n.11) in no way suggests that review is unwarranted in this case, where respondent did file a habeas corpus petition under Section 2241, and the court of appeals did comprehensively address the jurisdictional issue.

INA itself. *Richardson*, 1998 WL 889376, at *14. The rule against repeals by implication articulated in *Felker* v. *Turpin*, 518 U.S. 651 (1996), therefore has no application here; Section 1252(g) ousts the district courts' jurisdiction under 28 U.S.C. 2241 explicitly, not impliedly.

Respondent also notes (Br. in Opp. 23- 24) that this Court has considered, in habeas corpus proceedings, aliens' claims that they were eligible to be considered for discretionary relief from deportation. In neither *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), nor *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957), did the Court's opinion address the question of habeas corpus jurisdiction, however, and certainly in neither case did the Court suggest that habeas corpus jurisdiction was required by the Constitution itself. This Court has never considered itself bound by *sub silentio* jurisdictional holdings in the manner respondent suggests. See *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 97 (1994).

Although respondent maintains (Br. in Opp. 24-25) that judicial review of his *non-constitutional* claim is required by Article III as well as the Suspension of Habeas Corpus Clause, this Court has recognized that the federal courts have jurisdiction under Article III to review statutory questions only to the extent that Congress assigns it to them, see *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984), and also that "[t]he power to expel aliens, being essentially a power of the political branches of government, * * * may be exercised entirely through executive officers, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit," *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952) (internal quotation marks omitted); see *ibid.* ("No judicial review [of

deportation orders] is guaranteed by the Constitution."). That is especially so where, as here, the alien does not challenge his deportability (or, therefore, the INS's jurisdiction over him), but rather challenges the Attorney General's denial of discretionary relief from deportation. See *LaGuerre*, slip op. 9 (doubting that the Suspension of Habeas Corpus Clause "requires preserving habeas corpus as a vehicle for challenging final orders of deportation in cases in which the jurisdiction of the immigration authorities over the alien is not in question").[5]

5. Finally, respondent urges (Br. in Opp. 25) this Court to grant his conditional cross-petition for a writ of certiorari, to ensure that the Court may reach all the jurisdictional issues in the case and grant complete relief. We agree, for the reasons set forth in our response to that conditional cross-petition (see 98-1011 Gov't Br. for Cross-Resp.). Respondent also suggests (Br. in Opp. 26) that it would not be appropriate to grant certiorari in *Goncalves* to address the merits of the Attorney General's construction of Section 440(d) of AEDPA, because the Court would not be able to reach that issue in *Goncalves* if it agrees with the government that the district courts lack jurisdiction under Section 2241. Should the Court disagree with our jurisdictional argument, however, and conclude that jurisdiction was

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[5] Respondent relies (Br. in Opp. 24) on *CFTC* v. *Schor*, 478 U.S. 833 (1986), for the proposition that the federal courts must have authority to review his non-constitutional claim, but that case involved a federal agency's authority to adjudicate a state-law claim, not limitations on a federal court's jurisdiction to review a federal agency's determination of a federal statutory issue. See *id.* at 850-858. Moreover, the Court has noted that immigration cases involve "public rights" that may be assigned to administrative agencies for adjudication. See *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932).

proper in the district court under Section 2241, then it would be able in *Goncalves* to reach the merits of the temporal scope of Section 440(d) (which is independently worthy of this Court's review). But if the Court agrees with our jurisdictional position, then it would be able to resolve the temporal scope of Section 440(d) by granting review in *Reno* v. *Navas*, petition for cert. pending, No. 98-996, which presents all the jurisdictional issues presented in this case and *Goncalves*, and also raises the merits issues as well. In *Navas*, one of the aliens (Navas), like respondent here, filed both a petition for review and a petition for habeas corpus, and another (Henderson) filed a petition for review; the Second Circuit dismissed the petitions for review but granted relief to Navas on his habeas corpus petition, after concluding on the merits that Section 440(d) of AEDPA does not apply to aliens who filed an application for discretionary relief under Section 1182(c) before AEDPA was enacted. See 98-996 Pet. 14-19. If either Navas or Henderson files a conditional cross-petition for a writ of certiorari challenging the Second Circuit's dismisal of his petition for review (as respondent did here, to preserve his opportunity for relief), then the Court will be able reach the merits of the Section 440(d) issue in *Navas*, even if it concludes that the district courts lack jurisdiction under 28 U.S.C. 2241.

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For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 1998